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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1954.

No. 535

LEE B. SCHUMACHER,
Petitioner,

vs.

UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI

To the United States Court of Appeals for the Eighth Circuit.

DANIEL BARTLETT,
Counsel for Petitioner,
H. JACKSON DANIEL,
Of Counsel for Petitioner,
506 Olive Street,
St. Louis 1, Missouri.

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477.

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To the United States Court of Appeals for the Eighth Circuit.

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit entered in the above entitled cause on November 16, 1954.

OPINION BELOW.

The opinion of the Court of Appeals has not yet been reported and is printed in the Appendix, infra, pp. 45-63.

JURISDICTION.

The judgment of the Court of Appeals was entered on November 16, 1954. A timely petition for rehearing or, in the alternative, for transfer to the Court In Banc was filed by petitioner on December 6, 1954, and was overruled on December 14, 1954. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254 (1).

QUESTIONS PRESENTED.

1. Whether the trial court may, by incessant and hostile examination of petitioner, ally itself with the prosecution to the extent that the jury is inexorably led to believe that the trial court shares the prosecution's announced views of petitioner's guilt.

2. Whether the prosecutor may, under the guise of reading "hypothetical" questions asked of petitioner by the grand jury and by intelligence agents and by reading newspaper articles, letters and other extra-judicial matters to the trial jury, introduce incompetent hearsay highly prejudicial to petitioner.

3. Whether the Court of Appeals may affirm a six-count conviction by reviewing only one count while relying, as disclosed by the Court's own opinion, upon evidence adduced to support the other unreviewed counts.

4. Whether in a perjury case the **jury's** finding that petitioner's statement was incorrect can be substituted for petitioner's **knowledge** that it was false.

5. Whether, in a case involving five perjury counts, the trial court can instruct the jury, unequivocally and without exception, that the jury may convict petitioner on circumstantial evidence alone.

6. Whether the trial court can during the trial compel petitioner's counsel to surrender his private work papers, prepared for use at the trial, to the prosecution, particularly at a time when the prosecution's key witness was under cross-examination as to subjects covered by the very work papers ordered to be surrendered.

STATUTES INVOLVED.

The pertinent statutes are 18 U. S. C., Section 1503, and 18 U. S. C., Section 1621. They are set out in full in the Appendix, pp. 45 to 46.

STATEMENT.

Petitioner was convicted in the United States District Court for the Eastern District of Missouri on January 22, 1954, after a verdict by the jury rendered November 13, 1953, finding petitioner guilty on six counts of a six-count indictment charging him with violations of Sections 1503 and 1621, Title 18, U. S. C.

Count I of the indictment charged that defendant did "knowingly, wilfully, unlawfully, feloniously, and corruptly endeavor to influence a witness before the grand jury, and to obstruct, influence and impede the due administration of justice" in violation of 18 U. S. C., Section 1503. Counts II, III, IV, V and VI charged a violation of 18 U. S. C., Section 1621, in that petitioner committed perjury by falsely testifying under oath before agents of the Bureau of Internal Revenue as well as before a grand jury then impaneled at St. Louis, Missouri. The jury returned a verdict of guilty on each count, and the trial court sentenced petitioner to three years imprisonment on each count, the sentences to run concurrently and, in addition, imposed a fine of Two Thousand Dollars ($2,000.00) on Count II.

The factual background briefly is as follows: On March 1, 1951, the grand jury sitting at the time in St. Louis, Missouri, was instructed to and did conduct an investigation into the affairs of the then Collector of Internal Revenue in St. Louis. The grand jury was primarily interested in learning whether the Collector, one James P. Finnegan, had, with the assistance of others, attempted to obtain a Ten Million Dollar ($10,000,000.00) tax refund for the May Department Stores Company and whether the same persons had attempted to acquire control of Nicaro, a nickel plant, the property of the United States Government located in Cuba. The principal inquiry was to determine whether there was any connection between these

two activities. The grand jury was assisted in its investigation by agents of the Bureau of Internal Revenue.

The May Department Stores Company owned, among other stores, the Famous-Barr department store in St. Louis, which it operated under a fictitious name, to-wit, Famous-Barr Company, the only name by which it is known. A charge had been made by the St. Louis press that Finnegan, petitioner and others had attempted to expedite approval of the May Company tax refund claim, and that Finnegan was to receive a ten percent (10%) fee or commission for his part in securing approval of the claim. The grand jury was informed, principally by newspaper articles appearing in the St. Louis Post-Dispatch, that Finnegan and others, including petitioner, would use the million dollar fee thus obtained for the acquisition of Nicaro.

Early in 1949 petitioner, and H. G. S. Anderson, an engineer from Oklahoma, had been considering the practicability of acquiring Nicaro, and in exploring the matter further petitioner had contacted various branches of the United States Government in an effort to see if the property could be acquired or a contract be made for its operation by petitioner, Anderson and others who might be interested.

After a rather extensive series of meetings and negotiations between petitioner, Anderson and the various agencies and officials of the government charged with handling Nicaro, control of Nicaro was ultimately acquired by an entirely different group, and the effort to secure the plant was abandoned by petitioner.

There was evidence at the trial that during the period in which attempts to acquire Nicaro were going on Anderson wrote voluminously to petitioner. One of the letters purportedly written by Anderson to petitioner on February 18, 1950, read in part as follows:

> "I have been thinking that if this Nicaro deal can't be completed, we ought to propose to Finnegan and Boyle that they put the million dollars that they expect to get from the May Company into something else."

At the trial petitioner denied having ever received the letter or of having any knowledge of the contents thereof. The first count of the indictment charged that petitioner corruptly attempted to influence a witness before the grand jury and thereby obstruct justice by returning on November 1, 1951, the letter of February 18, 1950, quoted in part above, to Anderson together with a note saying:

> "Dear Andy: Please destroy any copies of this letter or any other that refer to Finnegan. Please . . .".

The note was concededly written by petitioner, but petitioner stoutly contended throughout the trial that the note accompanied and referred to an entirely different letter from Anderson which petitioner did return to Anderson at that time.

Petitioner was called before special agents of the Bureau of Internal Revenue on November 7, 1951, and testified under oath regarding Nicaro Nickel, the May Department Store Company matter and other matters relating thereto. On November 27, 1951, and again on February 7, 1952, petitioner was called before the grand jury and testified to the same matters.

Count II of the indictment charged that petitioner, on November 7, 1951, stated to agents of the Bureau of Internal Revenue that he did not know Fred Salomon of the May Department Stores Company, had never talked to Salomon and that he had never seen any executive of the May Department Stores Company.

The indictment charged that these statements by petitioner were false and charged that petitioner did, in fact,

know Fred Salomon of the May Department Stores Company, and that he had seen him and another executive of the May Company. Petitioner admitted at the trial that he had made statements before the agents as charged in Count II and admitted that they were entirely incorrect. His defense was that he was mistaken as to the identity of the "Salomon" about whom he was being questioned, and that he did not connect the Famous-Barr Department Store with the May Company which owned it. The alleged perjurious testimony on this part of Count II is as follows (T. 164):

> "A. (Reading) 'Question 87: You never talked with him? Answer 87: No.
>
> Mr. McWilliams: I think his name is Fred Salomon, General Manager of the May Department Stores.
>
> Mr. Schumacher: No.
>
> Question 88: Do you know Mr. Salomon? Answer 88: I know who Salomon is. I never met this Sidney Salomon, whoever he is.
>
> Mr. McWilliams: This is Fred Salomon.
>
> Mr. Schumacher: I don't know.
>
> Question by Mr. Dale: Question 89: He is a general manager. Did you ever see any executive in the Famous-Barr Company or the May Department Stores? Answer 89: No.'
>
> Mr. Purl: Thank you. No further questions."

Petitioner introduced evidence that almost immediately after giving this testimony to the special agents he had a telephone conversation with George Bolz, a friend, and learned that the agent's inquiries had been about Fred Salomon, general manager of Famous-Barr, and not Sidney Salomon, a prominent local businessman and political figure. The very next day defendant, on his own initiative, returned and talked to the same agent, and told him that he had been mistaken in his testimony. On this occa-

sion he told the agent that he had, in fact, seen and talked to Fred Salomon of the May Department Stores Company.*

PROCEEDINGS AT THE TRIAL.

During the course of the trial and particularly during the direct examination of petitioner, the trial judge took an active part in the examination of witnesses and particularly of petitioner. During the direct examination of petitioner alone, the trial judge asked at least 175 questions, many of them so phrased as to indicate a cynical disbelief of petitioner's answers.

An example of this (T. 740) occurred during the direct examination of petitioner where the trial judge intervened to cross-examine him about a matter appearing in the Prospectus the witness Anderson had prepared concerning the future operation of Nicaro. After pursuing the matter at some length the judge indicated his entire disbelief of petitioner's testimony in the following manner:

> "The Court: What I asked you was if you know who he was referring to when he said 'distribute to those persons who you can designate as being entitled to possible retainers for the help that they have afforded us in getting this project started, and the money provided.'
>
> The Witness: I don't know who he has any reference to.
>
> The Court: Slightest idea?
>
> The Witness: No.
>
> The Court: Never mentioned anyone——
>
> The Witness: Never mentioned anybody to him.
>
> The Court: **That was just a dream of his?**"

---

* Because this count, II, was the only one reviewed by the Court of Appeals, evidence as to other counts except where necessary for an understanding of the basic case is omitted.

In view of the government's theory that petitioner had been engaged in an attempt, perhaps with Finnegan or others, to extract a fee from the May Company which would be used in financing the Nicaro acquisition, an extremely important issue at the trial was the nature and extent of any association between petitioner and Finnegan. During the trial it appeared that Anderson had mailed some of his letterheads to petitioner (T. 758) addressed to Finnegan's office. Petitioner desired to use those letterheads for further correspondence with Government officials concerning the Nicaro Project (T. 759). The trial judge made it instantly clear (T. 760 et seq.) that he did not accept petitioner's explanation and implied that Finnegan's office was the base of petitioner's operations. The judge inquired (T. 762):

> "What else did you have up at Finnegan's office besides his [Anderson's] stationery?"

There had been no intimation in the evidence that petitioner had property of any sort in Finnegan's office or had used the same in any manner whatsoever. The trial court continuously interrupted and interfered with defense counsel's direct examination of petitioner, and on several occasions during this vigorous and cynical judicial cross-examination, petitioner stated that he could not explain or did not know why certain people had done specific things. Thereupon the court would indicate its refusal to accept these explanations by such colloquies as the following (T. 793-5):

> "The Court: What was the word that you were to report to Mr. Anderson about?
>
> A. Well, I told him about the conversation in Larsen's office, told him how Finnegan felt about it. I told him about Frager, Frager's comments in getting ready for Shields.
>
> The Court: How did you tell him Finnegan felt?

A. I told him Finnegan said to forget about it.

The Court: Why was Mr. Anderson inquiring what you heard from Finnegan about it?

A. I couldn't explain why he put this in the letter.

The Court: You can explain everything else, you cannot explain that?

A. He just—I never got word from Finnegan on Nicaro—probably wanted to know if I heard anything further from him.

The Court: Well, why would he expect you to hear anything further from him?

A. Well, he knew that I was talking to Finnegan about it in Washington.

The Court: You just told the jury you told him how Finnegan, at the Washington conversation felt, and he said to forget about it.

A. That is exactly what I told him.

The Court: And he comes right back with a letter asking if you got any further word?

A. Yes.

The Court: **You cannot explain that?**

A. No, sir.

The Court: **Anything else in that letter you cannot explain?**

A. It says I think that we will probably lose out on the deal and I think that has reference to that sentence that I was referring to or told him.

The Court: **You can explain that, but you cannot explain the other?''**

This letter of February 18, 1950, became the focal point about which the government's prosecution revolved. The trial judge conducted his own strenuous examination (T. 863 et seq.) with questions designed to elicit any possible inconsistencies in petitioner's answers, and scoffed at petitioner's explanation of his delay in returning Anderson's

letter for destruction. The judge, rhetorically with an intended significance not lost on the jury, asked this question (T. 869):

> "How did you happen to pick out this particular thing a few weeks after you got it and sent it back?"

The trial judge's persistent demeaning of petitioner in the eyes of the jury and his overt display of cynical disbelief in petitioner's answers were not confined to his incessant examination of petitioner throughout the trial. When he came to the charge to the jury, the judge joined forces completely with the prosecution. Thus, the trial judge went to the length of quoting from petitioner's testimony (T. 1260) in his charge, and immediately thereafter conveyed to the jury his entire disbelief of petitioner's version of the disputed episode by asking the jury (T. 1261):

> "Do you think, members of the jury, that these things could have taken place * * *."

Throughout the charge heavy emphasis was laid on the government's testimony, and the evidence was so skillfully marshalled, with such scant and fleeting references to petitioner's evidence, that the conclusion to which the jury was guided was inevitable and inexorable (e. g., T. 1261-4).

* * * * * * *

During the course of the trial a great deluge of hearsay "evidence" was read to the jury. This was accomplished by reading from grand jury testimony, newspaper articles, letters and "hypothetical questions" posed by grand jury interrogators to petitioner. Much of this extrajudicial and hearsay evidence was most damaging to petitioner, yet he was left powerless either to confront or cross-examine the sources of such statements.

Some examples of the hearsay that were given to the jury that convicted petitioner are as follows (T. 105-108):

"(Mr. Purl, attorney for the government, **reading from grand jury testimony** of 'questions' propounded to petitioner **by the grand jury interrogators**):

" 'That article relates that an employee of the firm of Touche, Niven, Bailey & Smart in the Arcade Building in St. Louis, had been approached by a third person who stated that if a certain law firm handled a refund for income taxes which had been prepared by the firm of Touche, Niven, Bailey & Smart, that the refund could be approved. The article further relates that the fee would be about twenty per cent of the three million dollars which was supposed to be the amount that the refund was for. Subsequently, Mr. Schumacher.'

" 'Mr. Purl (continuing to read):

" 'Subsequently, Mr. Schumacher, we talked to Mr. Edwin Wagner, Jr., who is a partner in the firm of Touche, Niven, Bailey & Smart, and to an employee, a Mr. William Huber, an employee of the firm of Touche, Niven, Bailey & Smart, and they related that the incident which is related in the Post-Dispatch had actually occurred at a downtown restaurant. In fact, the spot spoken of was the coffee shop of the Arcade Building. We spoke to Mr. Huber—he stated that he had been doing some work for a Mr. George Bolz and that this work consisted of the preparation of certain accounting figures which Mr. Bolz was going to use to try to obtain a refund on defense work which he had had during the war and on which he had suffered losses. The accounting work was to assemble figures upon which he could claim a refund on this defense work. Now, this refund which the firm of Touche, Niven, Bailey & Smart was working on through their employee, Mr. Huber, had nothing to do with income taxes or income tax refunds. It was merely concerned

with getting a refund through some other government agency than the Treasury Department. Mr. Huber related when we spoke to him that he had an appointment some time in the early part of 1949 with Mr. George Bolz to discuss the refund on this defense work and that this appointment took place some time in the afternoon of the day early in 1949, in the coffee shop in the Arcade Building. At that time he said that he also met a Mr. Lee B. Schumacher and that Mr. Schumacher was to take Mr. Bolz' claims for refunds on this defense work to someone in Washington to try to obtain a refund and that at this conference, at the end of it, Mr. Schumacher mentioned that he knew of a huge refund for income taxes which Touche, Niven, Bailey & Smart had prepared for one of their clients and that if he, Schumacher, could handle the claim or that he knew of a law firm that could handle it, the claim would be approved. Now, Mr. Schumacher, that's the reason we are now discussing this matter with you here today. That's the circumstances of the whole situation.' "

This long statement of purported "facts" read at the trial was thus paraded before the jury as proof of much of the government's case.

Yet, still another newspaper article was read to the jury and that incident appears at Transcript 140 as follows:

" 'Well, the information contained in a news article had stated that——

Mr. Bartlett: I object to the recitation of what the news article contained.

The Court: You may state the subject matter of the news article; not what it says.

Mr. Bartlett: May the jury be instructed this is not to be considered by them as evidence of the facts, any statements?

The Court: Let's see what his answer is, first.

A. The subject matter contained in that article was relative to the May—relative to an income tax refund claim prepared by Touche, Niven, Bailey & Smart. The article further stated that an attempt had been made to fix the claim, and that the article further related that a Mr. Wagner, Jr., of Touche, Niven, Bailey & Smart, was concerned in the thing. We had contacted Mr. Wagner over at Touche, Niven, Bailey & Smart, and subsequently talked to him.

Mr. Bartlett: Wait a minute. I object to this hearsay, your Honor. It's all hearsay, what he had done with others and what he has heard from others and what he read in the paper.

The Court: He said he contacted them. I don't think it is hearsay. Objection to that part is overruled. He hasn't stated what Mr. Wagner said to him. Proceed.

Q. And you are speaking about a May Department Stores Company claim for refund of income taxes?

A. That's correct. It was brought to our attention that Mr. Schumacher was a party that had been present——

Mr. Bartlett: Now, we are getting into hearsay again, your Honor. Hearsay from an unidentified person, now.

The Court: Please tell him what was said to you. The purpose of the question is to find out the subjects that you were inquiring about.'"

In addition to the irreparably damaging newspaper articles, the most prejudicial kind of hearsay was introduced in the guise of hypothetical questions asked of petitioner during his grand jury interrogation. All of this grand jury testimony was read to the trial jury. Some examples are as follows:

T. 177:

"Q. Did you ever have any conversation about the claim for refund in James P. Finnegan's presence?

A. Never.

Q. Are you sure of that?

A. Absolutely.

Q. Suppose H. G. S. Anderson would say that you had?"

Another colloquy, all incompetent hearsay, and all heard by the trial jury, is as follows:

T. 193:

"Q. Didn't I ask you this last time: that on or about August 28, 1949, Anderson told Purl and myself that on or about that date in Finnegan's law office in the Paul Brown Building in St. Louis that Finnegan would directly or indirectly obtain the one-million-dollar fee for putting through the ten-million-dollar tax refund for the May Company, that your group, the Finnegan-Schumacher-Anderson group would be in a very advantageous, meritorious position, desirable position, and that they would obtain a substantial down payment for the Nicaro Nickel Company plant? If Anderson told us that, that, to you, is incorrect, in your presence?

A. That is incorrect, yes, sir."

Because petitioner was being tried for perjury the following colloquy, again all incompetent hearsay, is most significant. It is found on pages 194, 195 of the transcript and is as follows:

"The Witness (reading): Q. And that you and Bolz said if the May Company claim could be processed by William M. Boyle, Jr., then you could [have] Bolz's claim serviced free legal wise. I have told you before that Salomon said that?

A. That is right.

Q. All right. You know that Salomon's version* on that is diametrically and violently opposed to yours, don't you?

A. It is absolutely opposed to anything that I said.

Q. **One of you is committing perjury.''****

The trial court compounded the error of admitting all of the aforesaid hearsay and prejudicial matter by charging the jury that they were not to consider hearsay unless (T. 1267):

> ''there has been evidence offered of such statements in this trial and admitted in evidence.''

Since all of the articles, newspaper clippings, letters and grand jury testimony were ''admitted in evidence,'' this constituted an instruction to the jury to consider all of the hearsay that had been presented to them, with the same force and effect as the relevant, competent evidence.

* * * * * * *

During the course of the trial it developed that petitioner's counsel had, long before petitioner's indictment, interviewed H. G. S. Anderson and had obtained from him a statement which conflicted directly (as it developed) with testimony Anderson gave at the trial. Anderson was concededly the principal witness against petitioner, and there is no question that without his testimony there would have been no case. Therefore, the statement voluntarily given to petitioner's counsel by Anderson, and which was contra-

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* Salomon did not appear or testify as a witness at the trial.

** Other examples of extrajudicial statements (of persons other than the defendant) which were admitted in evidence and presented to the jury the same as competent, admissible testimony are found in the transcript as follows: pp. 49, 103, 115, 140, 180, 194, 223, 292, 293, 531-34, 575, 641-2, 645, 661, 662, 1181, 1184, 1186, 1188, 1191 and 1198.

dictory of his testimony at the trial, became petitioner's counsel's most effective weapon in the defense of his client.

The circumstances surrounding the taking of the statement were that petitioner's counsel invited Anderson to his office and, upon Anderson's arrival, petitioner's counsel explained to him that in order to save Anderson's time and to avoid unnecessary delay petitioner's counsel would not take the notes of the interview himself but had employed a shorthand reporter to transcribe their conversation. Anderson freely and willingly answered all questions, and then the shorthand reporter transcribed the interview, giving to petitioner's counsel the copy thereof. Anderson was not sworn at the time of the interview, nor was he ever asked to sign a copy of the transcription. The transcribed statement, therefore, constituted working notes and a part of the private investigation file of petitioner's counsel.

On cross-examination of Anderson at the trial, petitioner's counsel commenced to question Anderson as to matters which had been covered in the interview, and to which Anderson had been giving a different version in his direct examination by government counsel just concluded. During this cross-examination (T. 346 et seq.) petitioner's counsel, while effectively discrediting the testimony Anderson had theretofore given, was interrupted by government counsel, and the following colloquy occurred:

> "Mr. Purl: Could I have a copy of the transcript from which you are questioning the witness?
>
> Mr. Bartlett: We're not obligated to give him a copy of this, your Honor.
>
> The Court: Well, as a matter of courtesy; you don't want him up looking over your shoulder?*

* This criticism by the trial judge was administered in the presence of the jury.

Mr. Bartlett: If your Honor wants us to give him one, as a matter of courtesy, we shall obey your Honor's instructions."

* * * * * * *

"The Court: * * * If you don't want to let him have a copy, just say so and I will tell him he cannot have a copy. **They have no right to force you to give them a copy.**"

Shortly thereafter, as the discrediting process continued, the trial court changed its mind and determined (T. 365-7) that it would be necessary for the petitioner's counsel to turn the entire statement over to the government. The following colloquy involving this matter is reported at Transcript 367 as follows:

"Mr. Bartlett: Then your Honor makes it a condition of my interrogating the witness with respect to this statement that I show it first to the government?

The Court: No, no, you can let them see it at the recess, after we adjourn this evening.

Mr. Bartlett: Couldn't we recess now?

The Court: No, I'm not taking up the time of the jury. We're trying the case. You can continue with the examination, and in the recess this evening, unless you want to hold it until tomorrow morning, but some time before this witness is finally excused the government will have a right if they want to examine the statements to see if they want to refer to anything in it. Proceed.

Mr. Bartlett: May I go on with this interrogation?

The Court: **Yes, but I have laid down the condition on which you may.**

Mr. Bartlett: **Yes, sir, they can have it under your Honor's orders.**" (Our emphasis.)

Acting under the direct instructions of the trial court petitioner's counsel did turn the statement over to govern-

ment counsel, and on the following day of trial and upon redirect examination, the witness stated (T. 441) that in the interim he had read the entire transcript, had gone over it with government counsel and had thereby refreshed his memory. The following colloquy, upon recross-examination, is indicative (T. 472):

> "Q. What did you look over or read or what did you do to refresh your recollection so that your recollection now is better today, in November, 1953, than it was on May 1st, 1952? What have you done in the meantime that refreshed your recollection?
>
> A. I have refreshed my memory by discussing some of the dates and events with people who participated, as government counsel, who are interested in the matter, and for that reason I was able to remember things which I did not remember when you put the questions to me in that statement.
>
> Q. So your recollection today and yesterday is better than it was on May 1st, 1952?
>
> A. It is.
>
> Q. It is. And that is because you have been talking to government counsel?
>
> A. Not entirely, no. I recall"——

Petitioner's counsel used the transcript of the interview only to interrogate Anderson and at no time offered it in evidence or made a statement that it would be offered in evidence.

At the conclusion of the trial the court gave a lengthy charge. The charge (T. 1211-1275) consumed more than an hour to deliver. The court commented (T. 1214) in the preliminary phases of the charge "certain parts of the charge apply with respect to certain counts of the indictment," but near the conclusion of the court's charge and just after it had completed its summary of the evidence (including much circumstantial evidence) on the five

counts charging perjury, the court charged the jury as follows (T. 1268):

"In this case, gentlemen, you have direct and circumstantial evidence. What is circumstantial evidence? If I make a statement to you as to how I came downtown this morning, that statement may be true or it may be false, but it would be direct evidence. Direct evidence can be as unreliable as any other type of evidence. On the other hand, circumstantial evidence may be as persuasive and as conclusive as the most positive direct evidence. Direct evidence is where a witness says, 'I saw this, that, or the other, I know it personally, I was there and heard it. Circumstantial evidence is where you undertake to prove a fact as a deduction or inference from some other fact or facts. There is a great deal of conflict and always has been as to the relative value of direct and circumstantial evidence. As far as the law is concerned, you can prove a case either by direct or circumstantial evidence, or a combination of the two. Circumstantial evidence is that character of evidence which tends to prove a disputed event or fact by proof of other facts which have a legitimate tendency to lead the mind to a conclusion that a fact exists which is sought to be established. That is legal evidence and a jury must act upon it the same as if it were direct evidence, when it is satisfied beyond a reasonable doubt. To the extent that the Government's proof in this case is circumstantial, the circumstances relied upon to convict must be consistent with guilt alone and not consistent with innocence or the balanced hypothesis of either guilt or innocence.

"The weight to be given to circumstantial evidence can be stated very simply. In order to justify a jury in finding a verdict of guilty, based entirely or substantially on circumstantial evidence, the facts sought

to be established by circumstantial evidence must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon that evidence. **The guilt of defendant may be shown by circumstantial evidence** or by both direct and circumstantial evidence. Whether it has been in this case is for you to determine."

After the court concluded its charge, it inquired if there were any exceptions (T. 1275). Counsel for petitioner replied:

> "I object to your Honor's part of the charge in which you discussed in broad general terms the character of circumstantial evidence, that circumstantial evidence was like direct evidence; and the statement could lead the jury to believe that perjury could be proved by wholly circumstantial evidence, whereas perjury can only be proved by direct evidence of a witness or two witnesses or direct evidence of a witness and circumstantial evidence. It is my view that perjury cannot be established wholly by circumstantial evidence."

The trial court did not even comment on the exception and refused to make any additional statement to clarify the circumstantial evidence charge as it related to perjury.

The Court of Appeals affirmed the conviction thus obtained in spite of many palpable errors, but it is most significant to note that only one of the counts (count II) was reviewed, and as will be indicated in the reasons for granting the writ, the court relied on an erroneous reason for affirming the conviction on that count.

REASONS FOR GRANTING THE WRIT.

1. The decision below, in its condonation of the conduct of the trial judge, sanctions such a gross departure by the district court from vital safeguards traditionally provided in the administration of criminal justice as to call for an exercise of this Court's powers of supervision. The court below, in thus permitting the abandonment of acceptable judicial procedure, has written an opinion in conflict with **Billeci v. United States** (D. C. 1950), 184 F. 2d 394. The opinion (pp. 9-10) states that the author has read the transcript of the trial and indicates that the questions asked by the trial judge were to "clarify the issues for the jury." It approves and condones the trial court's lengthy and hostile examination of petitioner on the ground that the "judge's questions and comments were not confined to the defendant alone."

Traditionally it is the duty of the prosecution, not the judge, to conduct a cross-examination of a defendant and, moreover, to do so in an orderly way and at the proper time. It is the universal rule and practice of Anglo-American jurisprudence that in a criminal case, especially, each side is entitled to put on its case without intermittent cross-examination or undue disruption. Cross-examination time, historically, and in fairness to all parties, is set over to the end of the direct examination. Yet here, where the strictest adherence to the rules of judicial conduct and the "separation of functions" between court, counsel and jury is required, the trial judge conducted an extensive, frustrating and disruptive cross-examination of petitioner not after, but during the direct examination of petitioner by his own counsel.

As was said by Judge Frank (dissenting) in **United States v. Giallo** (2 Cir., 1953), 206 F. 2d 207, 211 [certiorari granted, 98 L. ed. (adv. op.) 63]:

"Of course, a federal trial judge is no mere moderator or umpire. He has the duty to ask questions where necessary to elicit truth. * * * That argument, however, ignores this important fact: The judge, on objections by defendants' counsel, would never have allowed the prosecutor to behave as the judge did here, i. e., to interrupt disruptively, by cross-examination, defense counsel's direct examination of witnesses called by the defense. Moreover, as Judge Shelby remarked more than forty years ago: 'A cross-examination that would be unobjectionable when conducted by the prosecuting attorney might unduly prejudice the defendant when it is conducted by the trial judge.' "

It is important also to consider that questions asked a defendant by the trial judge take on a significance above and beyond those asked of mere witnesses. The court below states that the government's witnesses were also queried by the trial judge. The record shows that very few questions were asked these witnesses at any time and virtually none during direct examination by the government. But even if we were to assume the number of questions posed by the trial judge were equal, we are still confronted with what Judge Frank said in **Giallo**, l. c. 212:

"'* * * But when the judge's questions aid the government, he should be singularly careful lest he appear so partisan as to interfere with the (so-called) presumption of innocence. He must then refrain from 'exhibiting a prosecutor's zeal, inconsistent with that detachment and aloofness which courts have again and again demanded, particularly in criminal trials. Despite every allowance he must not enter the lists; he must not by his ardor induce the jury to join in a hue and cry against the accused. Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.'

"* * * For it is no secret that a defense counsel is at a grave disadvantage whenever the judge, interrogating a witness, puts a question which, if put by the prosecutor, would prompt an objection the judge would be obliged to sustain: If the lawyer objects, he may anger the judge and prejudice the jury against the defendant."

Even if we were to agree, as the court below says, that the trial court's questions were designed to "clarify the issues" and "confine the testimony," elementary fairness required that the vigorous cross-examination of petitioner be left to the prosecutor. It is palpable that in many instances a question which may be proper emanating from the prosecutor would be prejudicial if asked by the judge. It is, and we trust always will be, the function of the prosecutor, not the judge, to shoulder the burden of destroying the presumption of innocence. Judge Prettyman eloquently states this historic tradition in **Billeci v. United States** (D. C., 1950), 184 F. 2d 394, l. c. 403, as follows:

"The public interest requires that persons who have committed crimes be convicted of them. But the responsibility for producing the evidence which will persuade twelve jurors of guilt beyond a reasonable doubt is upon the prosecutor. It is a serious public responsibility, but it is upon the prosecutor and upon him alone. The judge has no part in that task. The prosecutor represents society in the prosecution. The attorney for the defense represents the accused. The judge is a disinterested and objective participant in the proceeding. 'Prosecution and judgment are two quite separate functions in the administration of justice; they must not merge.'

"The difference between assisting the jury, which is a duty of a federal judge, and encroaching upon its responsibilities, which is forbidden, has been developed at great length many times, as we have pointed

out. When a federal judge comments upon evidence by expressing his opinion upon phases of it he is treading close to the line which divides proper judicial action from the field which is exclusively the jury's. Therefore he must make it unequivocally clear to the jurors that conclusions upon such matters are theirs, not his, to make; and he must do so in such manner and at such time that the jury will not be left in doubt; references in some remote or obscure portion of a long charge will not suffice for the purpose."

If there had been some compelling reason for the incessant interruptions of defendant's counsel, the extended and hostile examination would be, perhaps, while not justified, explicable. But here there is not the slightest suggestion of any incompetency or fumbling by either counsel. The impropriety of the examination by the trial judge is thus further accentuated. As Judge Frank said in **Giallo**, l. c. 213:

"* * * Furthermore, there plainly was no justification for the constant interference by the court with counsel in their attempt to examine their witnesses. It did not expedite matters for the judge to take over such a large proportion of the examination and imposed unmerited burdens.

"I repeat that I have the highest respect for the trial judge. Accordingly, I would hesitate to criticize him, were nothing more involved than judicial etiquette. But here the liberty of another human being is at stake."

Petitioner respectfully submits that the unwarranted intrusion into the prosecution of the case below by the trial judge and the subsequent approval and condonation thereof by the Court of Appeals is so serious a departure from the traditional rules of fairness in criminal proceedings as to call for the exercise of the supervision of this Court.

Other courts of appeal,* apart from that of the District of Columbia in **Billeci v. United States**, supra, have condemned convictions where the judge invaded not only the province of the jury but of the prosecution. In the present case the invasion proceeded to extraordinary and almost unprecedented lengths, all to the destruction of any possibility or semblance of a fair trial. The unconcealed animus of the trial judge as displayed by the phrasing of his questions to petitioner; his repeated derisive comments concerning the petitioner's answers to his own or counsel's questions; the disruption of petitioner's direct examination so that the trial judge might conduct his own cross-examination, and the very length of that cross-examination, all of these—together with other categories of inappropriate conduct by the trial judge—could only serve to prejudice the petitioner before the jury and to impregnate them with the hostility manifested by the trial judge. To characterize the numerous questions and comments of the trial judge as "an attempt to clarify the issues," as the Court of Appeals said, either manifests incredible appellate naivete or else an abysmal misreading of or indifference to the transcript of the trial and of the charge to the jury. No one experienced in jury trials and mindful of the respect and reverence of jurors and others for the federal judiciary would minimize the impact on the jury of a hostile judge.

Here, instead of indulging the presumption of innocence to which the petitioner was entitled throughout the trial, the trial judge conducted himself under a contrary presumption. Whether the judge so intended or not, the judge's interrogation and manner could lead to only one result

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* United States v. Brandt (2 Cir., 1952), 196 F. 2d 653.
Sullivan v. United States (D. C. 1949), 178 F. 2d 723.
Glover v. U. S. (8 Cir., 1906), 147 F. 426.
Egan v. U. S. (D. C. 1922), 287 F. 958.
Hunter v. United States (5 Cir., 1932), 62 F. 2d 217.

despite the last-minute intonation of the usual admonition that the jurors are the ultimate triors of the facts. We do not suggest that a trial judge errs with every deviation from rigid imperturbability. We do urge, nevertheless, that no trial judge may doff his judicial robes, take on the garb of a prosecutor, then from time to time become a thirteenth juror, later return to bench and, with all this, remain immune from criticism.

Petitioner submits that the conduct of the trial judge was completely destructive of petitioner's right to a fair trial, and that unless this Court grants a review of this case the precedent established by the Court of Appeals in approving the conduct of the trial court will stultify traditional and historic safeguards inherent in the proper administration of criminal justice.

2. The decision below erroneously applies **Hansbrough v. United States,** 8th Cir., 1946, 156 F. 2d 327, and other Eighth Circuit cases cited in the opinion (page 2) holding that where a defendant has been convicted upon several counts of an indictment, and the sentence imposed is less than the maximum sentence which might have been imposed under any one count, the judgment will be sustained if the defendant was properly convicted upon any count. In so holding and in so relying, the opinion of the court conflicts with the decision of this Court in **United States v. Trenton Potteries Company,** 273 U. S. 392, which holds that the rule enunciated in **Hansbrough** and other cited cases applies **only where there is nothing in the record to suggest that the verdict of guilty on one count was in any way induced by the introduction of evidence upon other counts.**

Petitioner was convicted of six separate crimes against the United States, i. e., he was found guilty on each count of a six count indictment. The Court of Appeals reviewed only one of the convictions and refused entirely to review

any of the other five convictions. By this action the court has misapplied the rule of the cases relied upon by that court and has ignored entirely the rule enunciated in **United States v. Trenton Potteries Company,** supra. Although the affirmance of the conviction rests on count II alone, it is most significant that the Court of Appeals, in reviewing the evidence which it said sustained the conviction on that count, was required to and did refer to and set out in considerable detail evidence relating to and in support of other counts (pp. 4-6, Op.). This evidence had nothing whatever to do with the question of petitioner's guilt or innocence on count II. It is to be noted that on page 4 of the opinion the court below quotes from the letter of February 18, 1950, which was most prejudicial and damaging to petitioner, but which in no substantial way affected the question of petitioner's guilt on count II, i. e., whether petitioner had ever seen or knew any executive of the May Department Stores Company. Indeed, whether the witness Anderson wrote (or whether the defendant received) that letter would not in the slightest tend to prove that petitioner had seen Salomon or any other person whom he believed at that time to be an executive of the May Company, and doubtless would have been excluded at the trial if count II alone were at issue. If it were necessary for the court below to consider and judge petitioner's guilt or innocence on count II by the evidence adduced in support of other counts, then it was also necessary for the jury to consider the evidence adduced in support of other counts in arriving at its verdict of guilty on count II. Yet under the rule of **Trenton Potteries** it is **only** where the evidence on one count does not and can not induce a conviction on another count that the rule applied by the Court of Appeals here is appropriate. **Hansbrough v. United States** and the other cases cited by the Court of Appeals simply do not apply to the present situation, and the court proceeded in error by overlooking the **Trenton Potteries** case.

This Court has considered the precise contention urged here in **Trenton Potteries** and stated that a multi-count judgment will be affirmed if the evidence is sufficient on one count **only** where the verdict of guilty on that count was not **in any way** induced by the introduction of evidence on another count. Said this Court, 273 U. S., l. c. 402:

> "The jury returned a verdict of guilty generally on both counts. Sentence was imposed in part on the first count and in part on both counts, to run concurrently. The combined sentence on both counts does not exceed that which could have been imposed on one alone. **There is nothing in the record to suggest that the verdict of guilty on the first count was in any way induced by the introduction of evidence upon the second. In these circumstances** the judgment must be sustained if either one of the two counts is sufficient to support it. Claassen v. United States, 142 U. S. 140, 35 L. ed. 966, 12 Sup. Ct. Rep. 169; Locke v. United States, 7 Cranch. 339, 344, 3 L. ed. 364, 365; Clifton v. United States, 4 How. 242, 250, 11 L. ed. 957, 961." (Our emphasis.)

Count II, as set out in the Statement, supra, charges that petitioner was convicted for denying to intelligence agents that he knew "Salomon" of the May Company. The statement of the interview set out in full heretofore shows the obvious and understandable confusion in petitioner's mind over which "Salomon" was meant by the interrogators. When coupled with the voluntary explanation and corrective statement made by him the very next day after the interview, the conviction on that count becomes questionable at best. It is only when the backdrop formed by the evidence on the other counts is introduced that the charge contained in count II takes on any meaning and significance. It is patent that the conviction on count II was not only influenced by the evidence on the other counts, but

that, in fact, the evidence on the other counts induced and was directly responsible for the conviction on count II, the only count reviewed by the court below.

Petitioner's brief on appeal in the court below noted a number of serious errors by the trial court contributing to the conviction on the five unreviewed counts. As to one of the unreviewed counts (count I) it was conceded by government counsel on oral argument that the Court of Appeals would be required to reverse a previous decision of that court in order to affirm the conviction on that count. Government counsel did not confess error on the count, but instead urged the court to reverse its prior decision [**Walker v. U. S.**, 8 Cir., 93 F. 2d 792]. Other serious errors were alleged but the court below, by refusing to review any of those errors, condoned all of them by refusing to review all of the other counts.

Apart from its failure to apply the salutary rule laid down in **Trenton Potteries**, the court below also overlooks the practical consequences of the affirmance of a judgment of conviction which makes its conclusively appear that petitioner was guilty of six crimes. It appears to be the assumption of the court below in this case, and in **Hansbrough** and the other cases cited by the court, that because a defendant will in theory serve the same amount of time on affirmance of conviction upon one count as he would on five or six or any number of convictions where the sentences on all counts are the same and concurrent, the defendant should have no right to complain if his conviction on other counts or crimes is not reviewed. The assumption, however, fails to take into account that a defendant's consideration for conditional release, his treatment in prison and his status upon his return to free society will be adversely and directly affected by a final and presumably tested and reviewed conviction of six crimes as contrasted to a conviction on one.

If the decision of the court below is permitted to stand it will never be known whether petitioner was justly convicted of five serious offenses against the United States. For all that appears it should be as reasonable to assume that petitioner's conviction on the five unreviewed counts was erroneous as it is to assume that the conviction was justified. Yet the practical consequence is that petitioner has been finally adjudged guilty of six crimes. It appears to petitioner that his conviction has been "affirmed by avoidance" by a procedural device designed to ease the burdens entailed in a complete appellate review. We submit that questions of such magnitude in the administration of criminal justice as well as of painful consequence to petitioner should be resolved rather than thrust aside in the manner below.

In contrast with procedural strategem of the court below, notice the ruling of the Court of Appeals for the Third Circuit in **United States v. Rose**, 215 F. 2d 617, decided December 14, 1954, that as a matter of course it would review **all** counts, the court saying, l. c. 620:

> "Was there compliance with the standard of proof required to sustain a conviction of perjury with respect to each of the five counts of the indictment * * *?
>
> "On the score of the first issue it is the defendant's contention that the evidence, under applicable legal principles, was insufficient to sustain the jury's verdict of guilty as to each of the five counts of the indictment.
>
> "Under the circumstances **it is necessary to consider one by one the five counts of the indictment** with a view to determining whether the evidence adduced as to them was sufficient to sustain a conviction." (Our emphasis.)

Apparently the Third Circuit Court of Appeals recognized the adverse effect of a failure to review each count and conceived it to be its duty, under circumstances almost

identical with those here even to the nature of the offenses to review each conviction.

Ironically, if the piddling facts of count II, which the Court of Appeals chose to review in this case, had been the only offense involved it is most improbable that any self-respecting United States Attorney would have sought an indictment, much less brought such a thin and trivial set of facts to trial. Only against the backdrop formed by the evidence on the other counts* does count II acquire a coloration of substance, for, standing alone, the obvious and understandable confusion in petitioner's mind over which "Salomon" was meant, and the voluntary explanatory and corrective statements made by him promptly the very next day after the interview would have been more than enough to discourage any hope of successful prosecution.

In view of this is it believable that the verdict of guilty on count II was not "in any way" induced or influenced by the evidence on the other counts? We must and it is patent that the conviction on count II was not only **induced** by evidence on other counts, but that the other evidence was directly responsible for the one conviction reviewed by the court below.

For the foregoing reasons the court was in error in failing to review the convictions on the other five counts. We submit that the court should not have applied the "one-count" rule in the instant case, but that the circumstances required the application of the rule in **United States v. Trenton Potteries** and **United States v. Rose**, supra.

The failure of the court to review the validity of the conviction on each of the six counts raises not only serious

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* The evidence on the various counts was so closely related and intertwined that the government simply abandoned the original effort to segregate it by counts, and put it all in at trial in incoherent order.

moral and judicial considerations as to the adequacy of the appellate process, but it completely overlooks the intensely painful and practical consequences to a defendant who has been deprived of full judicial review. For this reason, if for no other, this court should grant its writ of certiorari so that this petitioner may ultimately be accorded his right of full appellate review instead of a mere pretense. There is no reason why the rule of this court in its **Trenton Potteries** decision shall be the law of all the land except that part encompassed by the Eighth Circuit.

3. The decision of the court below is in conflict with the decision of the Court of Appeals for the Second Circuit in **United States v. Otto**, 54 F. 2d 277, in that the court below has approved a conviction on Count II (perjury) without requiring a finding that the petitioner, at the time he made the alleged perjurious statement, had knowledge that it was false. Count II charged that petitioner "did knowingly and wilfully" state to certain special agents that he did not know and had never talked to Fred Salomon and had never seen any "executive" of the May Department Stores Company. It became necessary for the government to prove that petitioner had, in fact, seen "another executive of said May Company." The court below concluded that the petitioner had deliberately falsified by adopting the following reasoning (Op. 9):

> • • • "However, in view of the words in paragraph 5 of Count II, that defendant well knew he had seen 'Salomon and another executive in said May Company,' we deem it necessary to say that the government proved, and defendant admitted, that he had seen and talked to Mr. Bode, the manager of the Famous-Barr store, on the same occasion that he talked to Salomon. Defendant testified that he knew Bode was the manager of Famous-Barr. Bode testified that although he was not an officer of the May Company he was known as an official of the store and

that his duties were very definitely of the executive type. **The jury could reasonably find that he was an 'executive' of the May Company.''** (Our emphasis.)

From the court's reasoning it is apparent that the court has substituted a **jury finding** that Bode was an ''executive'' for the requisite **knowledge of petitioner** that Bode was an executive of the May Company at the time he made the statement. Petitioner submits that this is not the law in the Second Circuit or any other circuit. For example, in **United States v. Otto**, 2 Cir., 54 F. 2d 277, l. c. 279, the court said:

> ''* * * We all know, too, that a person accused of this crime is guilty only if he has **knowingly** sworn falsely.'' (Our emphasis.)

The evidence at the trial tended to show that Bode performed executive duties for the Famous-Barr Company department store which in turn was owned by May Department Stores Company. But this evidence does not establish (and there was no other evidence) that **petitioner** knew that Bode might be regarded as an executive of the May Company. For aught that appears petitioner either did not know Bode was an executive or mistakenly believed that he was not an executive. The test is **what the defendant knew or believed Bode to be** rather than what the jury concluded, months or years after the episode in question, Bode's status to be.

Thus, there was no evidence that petitioner deliberately falsified in the respect charged, and this failure of the evidence apparently accounts for the Court of Appeals' concern with what the jury could reasonably find Bode's status to be, rather than the real issue at stake which was —did **petitioner** know that Bode was an executive of the May Company at the time he was interrogated? Thus the court below overlooked an essential element in the proof of perjury without which the conviction on count II cannot be sustained.

4. In holding that the trial court did not violate petitioner's fundamental rights, the court below ignored and ruled in conflict with **Hickman v. Taylor**, 329 U. S. 495. Petitioner submits that it is fundamental law that the private working papers and work product of counsel in preparation for trial remain inviolate and outside of the realm and area of discovery. As such they may not be subpoenaed or ordered produced and turned over to adversary counsel either before or during the trial. Yet in this case the trial court directed petitioner's counsel to turn over to the witness Anderson and to government counsel a transcript of an interview which petitioner's counsel had with Anderson prior to the trial. As previously noted, the transcript of the statements by the witness Anderson was not signed or taken under oath. It was simply a record made for possible future use at the trial in the same way as other notes and memoranda made by counsel could be used.

This Court has been most sedulous in assuring that the constitutional right of defendants to counsel shall be observed in criminal proceedings. A necessary concomitant of that concept is the right of **effective** assistance of counsel. Counsel, to be effective, must investigate, explore, interview and make notes and thereby achieve a work product as part of his preparation. It is not enough that counsel simply appear in court and argue there. Counsel's investigation and research prior to the trial may be as important as anything he may say or do on the trial. This Court has struck down any effort by adversaries to invade and capture the product of counsel's labors. Particularly is this true of documents which an attorney has written out during his interviews with witnesses. In **Hickman v. Taylor**, 329 U. S. 495, this Court said, l. c. 510:

> "Here is simply an attempt, without purported necessity or justification, to secure written statements, private memoranda and personal recollections pre-

pared or formed by an adverse party's counsel in the course of his legal duties.

* * * * * * * *

"Historically, a lawyer is an officer of the court and is bound to work for the advancement of justice while faithfully protecting the rightful interests of his clients. In performing his various duties, however, it is essential that a lawyer work with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel. * * *

"* * * Were such open to opposing counsel on mere demand, much of what is now put down in writing would remain unwritten. An attorney's thoughts, heretofore inviolate, would not be his own. Inefficiency, unfairness and sharp practices would inevitably develop in giving of legal advice and in the preparation of cases for trial. The effect on the legal profession would be demoralizing. And the interests of the clients and the cause of justice would be poorly served.

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"Under ordinary conditions, forcing an attorney to repeat or write out all that witnesses have told him and to deliver the account to his adversary gives rise to grave dangers of inaccuracy and untrustworthiness. No legitimate purpose is served by such production."

Because the trial court compelled petitioner's counsel to turn over to the witness Anderson and to government counsel his counsel's notes of his interview with Anderson, petitioner was severely handicapped in presenting his defense. It must be recalled that this order was made while petitioner's counsel was cross-examining Anderson with the assistance of the transcript, and was effectively discrediting Anderson by showing contradictory statements made by him. Petitioner submits that thus tying the hand of his counsel is equivalent to denying him the right to

counsel. In **Coplon v. United States** (D. C., 1951), 191 F. 2d 749, it was stated, l. c. 760:

> "A defendant in a criminal case may not legally be found guilty except in a trial in which his constitutional rights are scrupulously observed No conviction can stand, no matter how overwhelming the evidence of guilt, if the accused is denied the effective assistance of counsel, or any other element of due process of law without which he cannot be deprived of life or liberty."

That the transcript of the interview with Anderson was of decisive significance in the defense of this case is not disputed, as undeniably Anderson was the government's key witness—to such an extent that without his testimony the government's case would have crumbled and dissolved. The court below concedes (op. 11) that "certain of the statements [in the transcript] appear to be inconsistent with Anderson's testimony on the witness stand."* It is also undisputed that the trial court directed petitioner's counsel to turn the statement over to the government. It seems equally clear that this invasion of his counsel's private working papers denied petitioner the effective assistance of counsel and, therefore, was a violation of both the rule in the **Coplon** case and directly in conflict with what this Court ruled in **Hickman v. Taylor.**

But the court below said it could not notice the error because petitioner's counsel "did not object." In the Statement we pointed out the colloquy concerning the introduction of this document and the forced surrender thereof to the prosecution in compliance with the order of the trial court. The court below apparently thought it was not required to rule on the point of error on two grounds: (1) petitioner's counsel, it is said, "failed to

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* This is a magnificent understatement. In the reported interview Anderson said that he had never heard petitioner mention Finnegan's name in connection with the May Company claim!

object" and (2) petitioner's counsel waived the objection by offering to read all of the transcript to the jury. As to (1), we believe that the court below confused "objection" with "exception." Petitioner's counsel never agreed to turn over or read the transcript to the **prosecution.** After the trial court ruled he was not required to do so, the court reversed its ruling and said that it was a condition of further cross-examination on the subject that petitioner's counsel must then and there agree to do so. Counsel said "if the court orders us to do so we shall comply." Of course, exceptions have been abolished. Therefore, there was no necessity for counsel to "except" to this adverse ruling. Certainly counsel could not be expected to say "we object to your Honor's ruling" for, if he had, it is reasonable to assume that counsel would have received another rebuke and another sharp reminder of the rule that no exceptions to adverse rulings were required.

With respect to (2), the offer petitioner's counsel made was to read the transcript **to the jury** in its entirety.* This, petitioner submits, was confused by the court below with an offer to submit the same to the prosecution and its witness Anderson before the examination of Anderson was even concluded.

In summary we submit that the court below has approved an erroneous action of the trial court, and by so doing, has condoned an invasion of petitioner's counsel's private working papers to such an extent as to wholly deprive petitioner of the effective assistance of counsel. Petitioner submits that the court's failure to review this action by the trial court on the ground that there was no "objection" to this action would cast an intolerable burden on all plicit order of the court (for which exceptions, being

* This offer the trial judge flatly rejected and even rebuked petitioner's counsel for making it. How could this be a waiver of objection?

counsel, for it would require counsel to except to an exabolished, should be unnecessary), and would require all this in the presence of the jury at the risk of provoking an adverse reaction not only from the judge but also from the jury.

The Court of Appeals also refused to take notice of this error under Rule 52 (b), Fed. Rules Crim. Proc., 18 U. S. C., providing that plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court. Petitioner submits that in failing to notice the error under Rule 52 (b), the court below has not only sanctioned a wholly unwarranted invasion of his counsel's private papers, but has done so in flagrant disregard of the governing decision of this Court in **Hickman v. Taylor.**

5. In condoning the action of the trial court in permitting the admission in evidence of a torrential volume of extremely prejudicial hearsay, the court below has so far departed from the accepted and usual course of judicial proceedings and has permitted such a violent departure from the rules of evidence by the trial court as to call for an exercise of this Court's supervisory powers.

The court below concedes (op. 13) "admittedly many extrajudicial statements in the form of newspaper articles, letters and grand jury testimony which the questioner attributes statements to others, were admitted into evidence." It is indisputable that the flood of extrajudicial matters and hearsay was highly prejudicial. The Court of Appeals justified the admission of this hearsay principally on the ground that it was adduced on many occasions in the form of "hypothetical questions" and not as statements of fact.

While it is true that a portion of petitioner's grand jury testimony read to the jury below consisted of hypothetical

questions directed at petitioner by questioners,* rather than statements of fact, in many instances the questions included flat recitations of fact attributed by the interrogators to others presumably already interviewed by them. In addition we submit the court overlooked a most significant circumstance. It should be remembered that the "questions" were posed not by ordinary lawyers or laymen. Each question was asked either by an Assistant United States Attorney or the foreman of the grand jury —both sworn representatives of the United States Government, with all of the prestige and power of that government. A question by such an officer of the United States as "Suppose Anderson told us you talked to Finnegan about the May Company claim?"** carries with it a ring of authenticity which is the equivalent of a flat statement of fact. It is inevitable that when the jury heard this testimony it never occurred to them that such a statement was a hypothetical question rather than a statement of the fact hypothesized. Coming, as it did, from the mouths of these officers, the jury believed, as it was intended for them to believe, that Anderson had in fact made precisely the statements attributed to him.

The court below attempts to justify the admission of this and other types of clearly incompetent hearsay on yet another ground. The opinion states that the trial judge cautioned the jury as to the limited purpose for which the hearsay evidence was offered. Petitioner submits that an examination of the transcript of the trial proceedings will show that the trial court, rather than cautioning the jury on each occasion as to the limited pur-

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* An example is this colloquy (T. 177):

"Q. Did you ever have any conversation about the claim for refund in James P. Finnegan's presence?
A. Never.
Q. Are you sure of that?
A. Absolutely.
Q. Suppose H. G. S. Anderson would say that you had?"

** Paraphrased for simplicity.

poses for which the hearsay was being admitted, expressly permitted the hearsay to come in in such a manner as to indicate the judge's approval of it. On numerous occasions when a request was made by petitioner's counsel that the court instruct the jury as to the limited purposes for which the hearsay was received, the trial court, rather than so cautioning the jury, would make such comments as "let's see what his answer is first" and "I don't think it is hearsay" and "if I find any case of that kind I will so inform the jury" (these colloquies are found at pages 140, 177 and 180 in the transcript).*

Petitioner respectfully submits that if hearsay, under whatever guise the same may take, is to become competent evidence in a criminal proceeding in the Eighth Circuit, the administration of justice in this circuit will become wholly different from the administration of criminal justice in all other courts of the United States. This Court should be most reluctant to permit a conviction to stand which has been achieved by such methods, and by such underhanded means of placing as "evidence" before the jury that which is not evidence by any acceptable standard. It was this Court which said in **Berger v. U. S.**, 295 U. S. 78, l. c. 88:

> "The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all, and whose interest, therefore, * * * is not that it shall win a case, but that justice shall be done. * * * He may prosecute with earnestness and vigor—indeed he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones."

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* Instead of such circumlocutions, it would better have served the interest of justice for the trial judge to have clearly cautioned the jury as requested—that such statements were not to be taken as proof of their content—or even that such statements were ever made to the officers.

We submit that only by granting the writ in the present proceeding can this Court take the opportunity to reprimand overzealous prosecutors and to caution lower courts as to their responsibilities in safeguarding at least the minimal rights of persons charged with crime. A case built on such "evidence" as was admitted here is a travesty on the administration of justice and there should be no shrinking from so declaring it.

6. In sustaining the instruction to the jury without qualification that it could convict petitioner on circumstantial evidence in a case involving five counts of perjury, the court below has rendered an opinion in conflict with **Bollenbach v. U. S.** (1946), 326 U. S. 607; **Mills v. U. S.** (1897), 164 U. S. 644; **Byas v. U. S.** (D. C., 1950), 182 F. 2d 94; **Patterson v. U. S.** (5 Cir., 1950), 183 F. 2d 687, and **McFarland v. U. S.** (D. C., 1949), 174 F. 2d 538, and has seriously impaired if not effectively destroyed the "two witness rule" in this circuit. No substantive rule has been more deeply entrenched in the federal law than that in order to convict in a perjury case, it is necessary that evidence be produced either by one witness with strong, independent and corroborative circumstantial evidence, or by the direct testimony of two witnesses. In the case at bar a brief, unemphasized but correct instruction on the quantum of evidence necessary to convict on a perjury charge was given in the early part of a long charge. Toward the end of the charge a strong and unqualified instruction was given that the jury might convict on circumstantial evidence alone. The latter instruction was not only inconsistent with the earlier instruction, so that the jury was left to flounder and make its own selection, but under the latter instruction the jury could convict of perjury without even the direct testimony of one witness. Such a handling of an important safeguard effectively destroys the "two-witness" rule while doing superficial lip-service to it.

As this Court stated in **Bollenbach v. U. S.**, 326 U. S. 607, l. c. 612:

> " ' "The influence of the trial judge on the jury is necessarily and properly of great weight." Starr v. United States, 153 U. S. 614, 626, 38 L. Ed. 841, 845, 14 S. Ct. 919, and jurors are ever watchful of the words that fall from him. Particularly in a criminal trial, **the judge's last word is apt to be the decisive word.** If it is a specific ruling on a vital issue and misleading, **the error is not cured by a prior unexceptional and unilluminating abstract charge.**' " (Our emphasis.)

That the unqualified instruction on circumstantial evidence was erroneous is conceded by the court below (Op. 16):

> "Standing alone, this instruction would obviously be erroneous when applied to the five counts of perjury charged in the indictment."

The court, however, justified the erroneous instruction by stating that early in the charge and on two occasions during the course of the charge the court did make reference to the two-witness rule. In justifying the charge as a whole on that basis the court entirely overlooked **Mills v. U. S.**, supra, where this Court said (164 U. S.), l. c. 649:

> " '• • • Although it may be claimed that other portions of the charge of the learned court stated correctly the law with reference to this particular case, yet we cannot escape the fear that the error above pointed out may have found lodgment in the minds of the jury.' "

and also **Byas v. U. S.**, supra, where the court said (182 F. 2d), l. c. 98:

> "• • • Thus where two inconsistent instructions are given, the effect of one or the other, depending on where the error lies, must be removed from their

minds before they can be allowed to retire to deliberate.''

We submit further that the lower court also overlooked **Patterson v. U. S.**, supra, where the court held (183 F. 2d), l. c. 690:

> ''* * * Under the circumstances no portion of the charge can be said to be harmless if it did not state correctly and fully the law applicable to the crime, even though it may be said that in other portions of the charge the correct rule was stated. Mills v. U. S., 164 U. S. 644, 17 S. Ct. 210, 41 L. Ed. 584. When a jury is given two instructions, 'one erroneous and prejudicial and the other correct, **and it is impossible to tell which one the jury followed, it constitutes reversible error.**' '' (Our emphasis.)

This was a criminal case in which a severe penalty was inflicted on a man with an exemplary life and reputation in his community. When his counsel requested, at the end of a long charge, that the trial court make the necessary qualification to the instruction on circumstantial evidence so that it be correct as to the perjury counts, the court ignored the request with silent indifference. In this case, out of six counts of which five dealt with perjury, the circumstantial evidence instruction was relevant and applicable to **only one count.** Petitioner submits that the indifference of the trial court and its condonation by the Court of Appeals should not go unreviewed by this Court. The question of affirmance of a conviction under these circumstances ought not to hinge on the fortuity that this case arose in one circuit rather than another.

CONCLUSION.

Petitioner submits that the manner in which this case was adjudicated in the trial court represents a gross aberration from the proper and decent administration of

criminal justice. The record is rife with palpable violations of fundamental safeguards to which this Court and other Courts of Appeal have conscientiously adhered.

The court below by its action permits a man to be hurried to prison in a case in which the trial judge joined hands with the prosecution instead of dispensing justice fairly and objectively. The court below refused to review the conviction on five of six counts in order to save judicial time and effort and the possible embarrassment of reversing a prior case, although the record and the lower court's own opinion clearly reveal that evidence introduced on the unreviewed counts contributed to, if it did not in fact induce, the verdict on the sole count chosen by the lower court for review. The court below piled Ossa upon Pelion when it affirmed a conviction of five perjury counts on the basis of an unqualified instruction that a defendant in such a case could be convicted on circumstantial evidence alone.

The court below by its decision has so departed from the accepted course of judicial proceedings as to call for the exercise of this Court's powers of supervision. The decision is so patently in conflict with decisions of this Court and the Courts of Appeals on these important questions that the petition for a writ of certiorari should be granted in order that the law may be uniform in the various circuits.

Respectfully submitted,

DANIEL BARTLETT,
Counsel for Petitioner,

H. JACKSON DANIEL,
Of Counsel for Petitioner,

506 Olive Street,
St. Louis 1, Missouri.

APPENDIX.

18 U. S. C., Section 1503:

§ 1503. Influencing or injuring officer, juror or witness generally.

Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 769.

18 U. S. C., Section 1621:

§ 1621. Perjury generally.

Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both. June 25, 1948, c. 645, 62 Stat. 773.

Federal Rules Criminal Procedure:

Rule 52 (b): Plain Error.

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the Court.

(Judgment.)

United States Court of Appeals for the Eighth Circuit.

No. 15001. September Term, 1954.

Tuesday, November 16, 1954.

Lee B. Schumacher, Appellant,

vs.

United States of America.

Appeal from the United States District Court for the Eastern District of Missouri.

This cause came on to be heard on the record from the United States District Court for the Eastern District of Missouri, and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and sentence of the said District Court in this cause be, and the same is hereby, affirmed.

And it is further Ordered by this Court that the defendant in the said District Court, Lee B. Schumacher, do surrender himself to the custody of the United States Marshal for the Eastern District of Missouri, in execution of the judgment and sentence imposed upon him within thirty days from and after the date of the filing of the mandate of this Court in the said District Court.

November 16, 1954.

United States Court of Appeals
For the Eighth Circuit.

No. 15,001.

Lee B. Schumacher, Appellant,

vs.

United States of America, Appellee.

Appeal from the United States District Court for the Eastern District of Missouri.

[November 16, 1954.]

Daniel Bartlett (H. Jackson Daniel was with him on the brief) for appellant.

W. Francis Murrell, Assistant U. S. Attorney, and Robert E. Brauer, Assistant U. S. Attorney (Harry Richards,

United States Attorney, was with them on the brief), for appellee.

Before Gardner, Chief Judge, and Woodrough and Van Oosterhout, Circuit Judges.

Woodrough, Circuit Judge.

This appeal is taken to reverse a conviction and sentence entered upon a jury verdict finding defendant guilty on all counts of a six-count indictment charging violations of sections 1503 and 1621, Title 18, U. S. C. A.

Count I of the indictment charged that defendant did "knowingly, wilfully, unlawfully, feloniously and corruptly endeavor to influence a witness before the grand jury and to obstruct, influence and impede the due administration of justice," in violation of 18 U. S. C. A., section 1503. Counts II, III, IV, V and VI charged, under 18 U. S. C. A., section 1621, that defendant committed perjury by falsely testifying, while under oath, to certain matters, hereinafter discussed, inquired of him by certain agents of the Bureau of Internal Revenue and by a duly impaneled grand jury sitting at St. Louis, Missouri. Upon the jury's verdict of guilty, the District Court sentenced defendant to three years imprisonment on each of the six counts, the sentences on all counts to run concurrently. The court also imposed a fine of $2,000 under Count II of the indictment.

Defendant, by a motion for acquittal made at the close of the government's case and renewed at the close of the entire case, has challenged the sufficiency of the evidence to sustain any of the charges laid in the indictment. Denial of the motion is asserted as error on this appeal. It is now

well settled law that where a defendant has been convicted upon several counts of an indictment, and the sentence imposed is less than the maximum sentence which might have been imposed under any one count, the judgment will be sustained if he was properly convicted upon any count. Hulahan v. United States, 8 Cir., 1954, ... F. 2d ...; Hansbrough v. U. S., 8 Cir., 1946, 156 F. 2d 327; Bowen v. U. S., 8 Cir., 1946, 153 F. 2d 747; Ganz v. U. S., 8 Cir., 1942, 127 F. 2d 498. Therefore, we shall not attempt in this opinion to review the evidence as to all counts. Our discussion of the evidence will be limited principally to Count II of the indictment since an additional penalty, in the form of a fine, was imposed on that count.

The errors urged on appeal by defendant may now be stated as follows: (1) The trial court erred in overruling the motion for acquittal on Count II for the reason that there was no evidence that defendant wilfully swore falsely to the matters charged therein; (2) defendant was denied a fair trial by reason of certain actions of the trial court; (3) the trial court committed prejudicial error by reason of certain rulings on evidence during the trial; and (4) the case was submitted to the jury under erroneous instructions.

A brief statement of the factual background out of which these charges against defendant arose is as follows: On or about March 1, 1951, a duly convened federal grand jury sitting at St. Louis, Missouri, commenced an investigation into the conduct and affairs of James P. Finnegan, the then Collector of Internal Revenue in St. Louis, defendant Lee B. Schumacher, and others. Specifically, the grand jury was interested in learning whether Finnegan, defendant and others had attempted to obtain a $10,000,000 tax refund for the May Department Stores Company; whether these same persons had attempted to acquire control of the Nicaro

Nickel Plant, property owned by the United States government in Cuba; and whether there was any connection between these two matters. Investigation by the Grand jury was prompted by a newspaper article appearing in the St. Louis Post-Dispatch in March, 1951. The grand jury was assisted in its investigation by special agents of the Bureau of Internal Revenue who were also investigating the affairs of the Collector of Internal Revenue in St. Louis.

It appears that early in 1949, defendant and one H. G. S. Anderson, of Muskogee, Oklahoma, were considering the practicability of acquiring control and operation of the Nicaro Nickel Plant in Cuba. This property, owned by the United States Government and under the control of the War Assets Administration, was operated at a loss during World War II and was lying idle at this time. Defendant asked Finnegan if he knew anyone at the War Assets Administration who could provide information as to the government's intentions with respect to Nicaro Nickel. Finnegan furnished defendant with the name of an official at War Assets whom defendant contacted. Thereupon began a prolonged series of meetings and negotiations between defendant, Anderson, and others with various agencies and officials of the government in an effort to acquire control of Nicaro Nickel. Ultimately, however, the efforts proved unsuccessful and Nicaro Nickel was acquired by other parties.

During this same period the May Department Stores Company, of which the Famous-Barr store in St. Louis was and is a wholly-owned subsidiary, had pending before the Bureau of Internal Revenue a tax refund claim against the United States in the amount of approximately $10,000,000. The grand jury and special agents were investigating the charge that Finnegan, defendant, and others attempted to expedite approval and payment of that tax refund claim

and that Finnegan and another would receive a 10% commission, or $1,000,000, for their part in securing approval of the claim. The grand jury also heard that in August or September of 1949, defendant told Anderson that the million dollar fee would be applied to the purchase of Nicaro Nickel. A letter, written by Anderson to defendant on February 18, 1950, read as follows:

"I have been thinking that, if this Nicaro deal can't be completed, we ought to propose to Finnegan and Boyle that they put the million dollars that they expect to get from the May Company into something else.

* * * * * * * *

"In other words; Don't let this million bucks get away from us."

Defendant was called before special agents of the Bureau of Internal Revenue on November 7, 1951, and testified under oath regarding the Nicaro Nickel and May Department Store Company matters. On November 27, 1951, and again on February 7, 1952, defendant testified before the grand jury on the same matters. H. G. S. Anderson was also called before the grand jury on November 13, 1951, and testified as to his connection with these matters.

The first count of the indictment charged that defendant corruptly attempted to influence a witness before the grand jury and obstruct the due administration of justice by returning, on November 1, 1951, the letter of February 18, 1950, quoted in part above, to Anderson, together with a note saying:

"Dear Andy: Please destroy any copies of this letter or any other that refers to Finnegan. Please——"

The note was in defendant's handwriting but the defense was that this note referred to an entirely different letter

which defendant returned to Anderson at that time. Defendant denied ever receiving the letter of February 18, 1950, from Anderson.

1. Count II of the indictment charged that defendant, on November 7, 1951, while under oath, stated to certain named agents of the Bureau of Internal Revenue:

"4. That he (defendant) did not know Fred Salomon of the May Department Stores Company and had never talked to said Salomon, that he (defendant) had never seen any executive in the May Department Stores Company, [and that he did not state to said Salomon that some lawyer could handle the May Department Stores Company's tax refund claim and obtain approval of the same, and that he (defendant) did not call upon said Salomon and tell him that he (defendant) could expedite said tax refund claim and afford said May Company help on the same].[1]

"5. That said defendant, at the time he testified as aforesaid, did not believe said testimony to be true, and then and there knew the same to be false, and then and there well knew that he had talked to Fred Salomon, of the May Department Stores Company, and that he knew said Salomon, and said defendant then and there well knew that he had seen Salomon and another executive in said May Company [and well knew that he (defendant) had conferred with Salomon and stated to said Salomon that some lawyer could handle the May Company Internal Revenue tax refund claim and obtain approval of the same, and defendant then and there well knew that he had called on said Salomon and told Salomon that he (defendant) could expedite said May Company tax refund claim and help said company with the same].

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[1] The specifications of perjury enclosed in brackets were not submitted to the jury, the trial court stating that there was no substantial evidence to support those charges.

"Contrary to the provisions of Title 18, United States Code (Rev.), Section 1621."[2]

Therefore, the jury was required to consider only three specifications of perjury under Count II: (1) that defendant did not know Fred Salomon of the May Department Stores; (2) that defendant had never talked with said Salomon; and (3) that defendant had never seen an executive of the May Department Stores.

Defendant admitted on the trial and admits here that he made the statements before the Internal Revenue Agents on November 7, 1951, as charged in Count II of the indictment. He also admits that the statements regarding Salomon were incorrect. His defense was that he was honestly mistaken as to the identity of the Salomon about whom he was questioned. The testimony given before the special agents and charged as perjurious was as follows:

"Q. You never talked with him? A. No.

"Q. I think his name is Fred Salomon, General Manager of the May Department Stores. A. No.

"Q. Do you know Mr. Salomon? A. I know who Salomon is. I never met this Sidney Salomon, whoever he is.

Q. This is Fred Salomon. A. I don't know.

Q. He is a general manager. Did you ever see any executive in the Famous-Barr Company or May Department Stores? A. No."

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[2] 18 U. S. C. A., section 1621:

"Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both."

Defendant introduced evidence to the effect that, after leaving the special agent's office, he contacted a friend and learned that the inquiry was about Fred Salomon, general manager of the May Department Stores Company, and not Sidney Salomon, a prominent local business man and political figure. Defendant returned and talked to the same agent the following day and told him that he was mistaken in his previous testimony. On this occasion he told the agent that he had seen and talked to Fred Salomon of the May Department Stores Company. Thus the defendant argues that there was no evidence that he wilfully testified falsely with respect to the first and second specifications of perjury in Count II and that it was error to submit the same to the jury.

We think the issue thus presented was properly left for the determination of the jury, under appropriate instructions of the court. The court instructed the jury:

"Now, even though the defendant, you may find testified falsely before the grand jury or before the Agent, that is not sufficient to convict him, nor would it be sufficient that he testified falsely but did so carelessly, or negligently, or hazily, but it must appear that he testified falsely and so testified intentionally, and at the time he testified that he knew the testimony he was giving was false.

* * * * * * *

"In passing on the question, whether the defendant testified falsely or truly with reference to that part of the charge laid in count two of the indictment, that he did not know Fred Salomon of the May Department Stores Company and never talked to Fred Salomon, you can consider any and all parts of his testimony given before Government Agents on November 7, 1951, in order that you may satisfy yourselves as to whether the defendant at the time mentioned misunderstood the questions propounded to him in the regard, and you may take into further consideration

any statements the defendant made on this subject to said Government Agents on November 8, 1951, that did or would tend to establish any misunderstanding on the part of the defendant in connection with his testimony on November 7, 1951, before Government agents"

No error is assigned as to these instructions. It was within the province of the jury to determine whether defendant was honestly mistaken as to Salomon's identity or whether the original statements were wilfully false and the modification thereof was a mere recantation. We find no error in the action of the trial court in overruling the motion for acquittal as to these specifications of Count II.

As to the third specification of perjury in Count II—that defendant had never seen an executive of the May Department Stores—clearly Salomon, the general manager, would fall within this category. However, in view of the words in paragraph 5 of Count II, that defendant well knew he had seen "Salomon and another executive in said May Company", we deem it necessary to say that the government proved, and defendant admitted, that he had seen and talked to Mr. Bode, the manager of the Famous-Barr store, on the same occasion that he talked to Salomon. Defendant testified that he knew Bode was the manager of Famous-Barr. Bode testified that although he was not an officer of the May Company he was known as an official of the store and that his duties were very definitely of the executive type. The jury could reasonably find that he was an "executive" of the May Company. We find no error in submitting the third specification of perjury in Count II to the jury.

2. The second assignment of error charges that the defendant was denied a fair trial by reason of the trial court's (a) extended cross-examination of defendant which prevented an orderly presentation of the defense; (b) framing of questions and comments in a manner indicating the

judge's disbelief of defendant's answers; (c) placing undue emphasis on the government's evidence in the charge to the jury.

Without detailing an extended comment on these various charges leveled at the actions of the trial court, we merely note that the entire transcript of the lengthy trial proceedings has been read and considered and we find no basis therein to support the defendant's charges. On the contrary, the record clearly indicates that the numerous questions and comments by the trial court were made in an attempt to clarify the issues for the jury and to restrict the testimony to what was relevant to the charges laid in the indictment. Nor were the judge's questions and comments confined to the defendant alone. Witnesses for the government were similarly treated. We think the action of the trial court in seeking to clarify the issues for the jury and to confine the testimony to the charges alleged was consonant with the frequently expressed thought that a federal trial judge is more than a mere moderator or umpire. The trial court was fair and impartial in its questioning and commenting in respect to the witnesses, and also in its final resume of the evidence to the jury. Further, we note that the court in its final charge reiterated many times that the jury was the sole and exclusive judge of the facts, the credibility of the witnesses, and the weight to be given to their testimony. We conclude, therefore, that defendant was not deprived of a fair and impartial trial by reason of the actions of the trial court.

3. Defendant next urges that two rulings of the court during the trial constituted prejudicial error and require a reversal. The first ruling complained of required defendant to make available to the government a "transcript" of statements his counsel was using to cross-examine Anderson, the chief witness for the prosecution. This "transcript" was a verbatim recordation of a question and an-

swer interview between Anderson and defendant's counsel made by a court reporter in said counsel's office on an occasion prior to this trial when defendant was seeking to have another indictment against him dismissed. The statements in the "transcript" were pertinent to the issues in the present case and defendant's counsel was cross-examining Anderson by reading portions of the "transcript" and asking the witness if he had made such statements at that time and, if so, whether they were correct. Certain of the statements appeared to be inconsistent with Anderson's testimony on the witness stand. The court directed that the "transcript" should be made available to the government for its examination and use, if it so desired, at some time before the witness Anderson was finally excused. Defendant turned over the "transcript" to government counsel and now charges as error the court's ruling which directed him to do so.

But it must be held that defendant is not in a position to urge in this court that the trial court erred in requiring him to turn over the "transcript" to government counsel for inspection. The record shows that no objection was entered by defendant with respect to this ruling of the trial court. Defense counsel, at the time of the ruling stated, "they can have it [the "transcript"] under your Honor's orders." Immediately prior thereto, upon the court's indicating that it would require the "transcript" to be made available to government counsel, defense counsel suggested, "Could I solve the whole problem by reading the whole thing to the jury so we can get one connected story?" The statements made by defense counsel reflected his acquiescence in, rather than any objection to, the court's requirement. If it was defendant's position that this requirement was error, he should have made his position known to the trial court. It is a well-settled rule that alleged errors not brought to the attention of the trial court will not be considered on appeal. Mitchell v. U. S., 8 Cir., 206 F. 2d 854;

Blodgett v. U. S., 8 Cir., 161 F. 2d 47; United States v. Jones, 7 Cir., 204 F. 2d 745. Designation of the ruling as error in the motion for a new trial does not cure the failure to make timely objection as this court, generally speaking, will not review the action of the trial court in ruling on a motion for a new trial. O'Brien v. General Accident, Fire & Life Assurance Corp., 8 Cir., 42 F. 2d 48.

Nor are we disposed to notice the alleged error under Rule 52 (b), Fed. Rules Crim. Proc., 18 U. S. C. A., which provides that "Plain errors or defects affecting substantial right may be noticed, although they were not brought to the attention of the court." Our power to notice plain error not objected to will be exercised only to prevent a miscarriage of justice. Mitchell v. United States, supra. Examination of this record convinces us that there is no occasion or necessity for exercising such power here.

The second ruling of the trial court complained of was the admission into evidence of a subpoena issued to Fred Salomon and testimony concerning his unavailability as a witness. At an independent hearing held prior thereto, the court had ruled that Salomon's health, as testified to by his physicians, warranted his absence from this trial. The court did not err in admitting into evidence the subpoena and testimony respecting Salomon's absence from the trial. The failure to call a material witness, without good cause shown, justifies, if it does not compel, the inference that the testimony of the absent witness would have been unfavorable. Wesson v. U. S., 8 Cir., 1949, 172 F. 2d 931; Donnelly Garment Co. v. Dubinsky, 8 Cir., 1946, 154 F. 2d 38. Salomon's testimony was an important part of the government's case, especially on Count II. It would present an anomaly in the law if, while one party may comment upon the absence of an opposing party's witness, Chicago & N. W. R. Co. v. Kelly, 8 Cir., 1936, 84 F. 2d 569, the opposing party were not permitted to introduce evidence to excuse the absence of such witness.

4. Defendant also contends that two of the court's instructions to the jury were erroneous. Defendant requested the following instruction:

"The court instructs the jury that the Constitution of the United States provides that in all criminal prosecutions, the defendant shall enjoy the right to be confronted with the witnesses against him and hence you shall not consider any newspaper article that may have been admitted in evidence as any proof whatsoever of any fact or statement reported in such article, or as any proof such reported statement was given and for the same reason no testimony or other statement of any witness [other than the defendant himself] given at any other time and place than at this trial, is to be considered by you as proof of any fact asserted in such other testimony or statement."

The court, in giving this instruction to the jury, omitted the portion in brackets and added the following:

"Unless there has been evidence offered of such statements in this trial and admitted in evidence."

Defendant argues that the instruction as given by the court was erroneous because it permitted the jury to consider as substantive evidence extra-judicial statements of persons made outside of the trial.

We do not think the instruction, considered in the light of the procedure followed during the trial, is subject to such criticism. Admittedly, many extra-judicial statements, in the form of newspaper articles, letters, and grand jury testimony in which the questioner attributed statements to others, were admitted into evidence. But on each occasion the court carefully instructed the jury as to the limited purpose for which the evidence was admitted. Early in the trial when the government offered a newspaper article in evidence, the court ruled:

"Members of the jury, an article in the Post-Dispatch has been referred to, as you have heard a number of times, and the article is now going to be read to you. Now, you are not to assume, in hearing this article, that anything said in the article is true. That article prompted certain investigations, and that is the reason it is offered and received in evidence, that it served the purpose of causing investigations to be made, but as to the things that are said in the article, do not consider any of those statements as true.

"Mr. Bartlett: Something more than that. Not only that they just not consider them true, but they are not evidence at all of the facts as stated in the article.

"The Court: Well, I will go farther and say they are not only not to be considered by you as true, but as not evidence of the facts referred to in those articles. Is that satisfactory?

"Mr. Bartlett: Precisely."

Thereafter, as other newspaper articles and letters were offered in evidence, the court instructed the jury that they were not to be considered as evidence of the facts stated therein, but for a very limited purpose, such as to show defendant's knowledge of the grand jury investigation, etc. Defendant's objections to the admission of certain grand jury testimony was overruled on the ground that such testimony was not a statement of fact. For example, at the grand jury hearing defendant was asked:

"Q. Suppose H. G. S. Anderson would say that you had [a conversation with Finnegan regarding the May Department Stores Company claim]."

When this testimony was read at the trial, the court made the following ruling:

"Mr. Bartlett: May I ask the court to instruct the jury where he says he has been informed by someone else of

this fact and that fact, it is not to be considered as evidence of any fact whatsoever?"

"The Court: Well, I don't understand this question at this time. The motion as to this question will be overruled."

Clearly this was a hypothetical question, not a statement of fact, and the objection was properly overruled. Other objections to questions so constructed were overruled for the same reason. As the trial progressed, the government introduced direct testimony of witnesses covering many of the same statements previously objected to as hearsay. See and compare Finnegan v. U. S., 8 Cir., 1953, 204 F. 2d 105, 115. These witnesses testified to conversations with defendant which bore directly on many of the questions in issue. Under defendant's requested instruction they could not have been considered as evidence by the jury because they were statements "given at a time and place" other than at the trial. As noted by the trial court in its Memorandum Opinion overruling defendant's motion for new trial, the requested instruction was so broad as to probably be confusing to the jury. We think the instruction given was proper in the light of the rulings made on extrajudicial statements throughout the trial. We find no error therein.

It is also urged that the court erred in instructing the jury as to the quantum of proof required to convict in a perjury case. The court, in the closing portions of a charge covering approximately sixty pages in the typewritten transcript, made this statement:

"In this case, gentlemen, you have direct and circumstantial evidence. What is circumstantial evidence? * * * Circumstantial evidence is where you undertake to prove a fact as a deduction or inference from some other fact or facts. * * * As far as the law is concerned, you can prove a case either by direct or circumstantial evidence, or a combination of the two. * * * That [circumstantial evidence]

is legal evidence and a jury must act upon it the same as if it were direct evidence, when it is satisfied beyond a reasonable doubt. To the extent that the government's proof in this case is circumstantial, the circumstances relied upon to convict must be consistent with guilt alone and not consistent with innocence or the balanced hypothesis of either guilt or innocence.

"The weight to be given to circumstantial evidence can be stated very simply. In order to justify a jury in finding a verdict of guilty, based entirely or substantially on circumstantial evidence, the facts sought to be established by circumstantial evidence must not only be consistent with the guilt of the defendant, but they must be inconsistent with any other reasonable hypothesis that can be predicated upon that evidence. The guilt of defendant may be shown by circumstantial evidence or by both direct and circumstantial evidence. Whether it has been in this case is for you to determine."

Standing alone, this instruction would obviously be erroneous when applied to the five counts of perjury charged in the indictment. Considering the instructions as a whole, however, we do not think the jury was in any way misled as to the degree of proof required to convict on the perjury counts. At the beginning of the charge the court said:

"In giving the law to you, as I understand it, Gentlemen, I am not giving you a series of instructions. Certain parts of this charge apply with respect to certain counts of the indictment, as I shall indicate or try to indicate; as to other parts, those parts should be accepted and used by you and applied to the whole of the case. It would be improper for you to disregard part of this charge that applies to the case and the various counts and use the remainder. Under circumstances of that kind, the charge would not fit the case. And I am sure you will not do that."

The court then instructed the jury on the presumption of innocence and the meaning of "reasonable doubt". After a somewhat lengthy discussion of Count I, the elements required to establish the crime, and a summation of the evidence in relation thereto, the court stated:

"Now I will discuss counts two, three, four, five and six.

The law provides that no person may be convicted of the crime of perjury unless the alleged falsity of the statements made by a defendant under oath be established by the testimony of two independent witnesses or by one witness and other corroborating facts and circumstances. In the absence of such proof, the defendant must be acquitted as to such charge or charges where the proof so fails to sustain the charges.

Two elements must enter into a determination that corroborative evidence is sufficient. First, that the evidence is corroborative evidence that, if true, substantiates the testimony of the single witness's statement; and, second, that the corroborative evidence is trustworthy."

Again, after summing up the evidence as to Count II, the Court told the jury:

"Whether the charge in count II has been proven by the testimony of two witnesses or one witness, and strong corroborative testimony, is a matter for you to determine."

Relative to Count VI, the last charge of perjury, the court instructed the jury:

"If you believe the testimony of the witness Anderson as to his conversation with defendant in the automobile, the witness Bode, store manager or manager of Famous-Barr, and the testimony of Mr. Huber, the accountant, you may then consider whether or not the testimony of these witnesses corroborate one another."

Then, in the closing portion of the charge, the court made its general statement regarding circumstantial evidence.

Upon a careful consideration of the entire charge, we are firmly convinced that the jury was properly instructed and was not misled as to the quantum of proof required to convict the defendant on the charges of perjury. See and compare Boehm v. U. S., 8 Cir., 1941, 123 F. 2d 791, also a perjury case, where a general charge on circumstantial evidence was given by the trial court and approved by this court.

We conclude that the defendant received a fair and impartial trial, free from prejudicial error, and that the jury's verdict of guilty was supported by substantial evidence. The judgment is affirmed.

A true copy.

Attest:

E. E. Koch,

(Seal) Clerk, U. S. Court of Appeals, Eighth Circuit.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 535

LEE B. SCHUMACHER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (Pet. App. 47-64) is reported at 216 F. 2d 780. The memorandum opinion of the District Court on a motion for a new trial appears at pages 37-64 of the record.[1]

JURISDICTION

The judgment of the Court of Appeals was entered on November 16, 1954 (R. 90). A petition for rehearing or in the alternative to transfer to

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[1] The record is unprinted. "Tr." references designate the stenographic transcript of evidence in the District Court.

the court *en banc* was denied on December 14, 1954 (R. 91-92). The petition for a writ of certiorari was filed on January 12, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED

1. Whether the trial court's cross-examination of petitioner deprived him of a fair and impartial trial.

2. Whether the court below erred in reviewing the sufficiency of the evidence under count II instead of under all six counts, where concurrent sentences on all counts were less than the maximum possible under any one count.

3. Whether the trial court properly required petitioner to make available to the prosecution a transcript of a pretrial interview with a government witness which was used by petitioner's attorney in cross-examining the witness.

4. Whether statements contained in newspaper articles and grand jury testimony were properly received in evidence in view of instructions limiting their purpose.

5. Whether the trial court's final charge left the jury at liberty to find petitioner guilty under perjury counts on circumstantial evidence alone, disregarding the "two witness" perjury rule.

STATUTES INVOLVED

18 U. S. C. 1503, 62 Stat. 769 provides:

> Whoever corruptly, or by threats or force, or by any threatening letter or communica-

tion, endeavors to influence, intimidate, or impede any witness, in any court of the United States or before any United States commissioner or other committing magistrate, or any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or other committing magistrate, in the discharge of his duty, or injures any party or witness in his person or property on account of his attending or having attended such court or examination before such officer, commissioner, or other committing magistrate, or on account of his testifying or having testified to any matter pending therein, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, commissioner, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 1621, 62 Stat. 773, provides:

> Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will testify, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, willfully and contrary to such oath states or subscribes any material matter which he does not believe to be true, is guilty of perjury, and shall, except as otherwise expressly provided by law, be fined not more than $2,000 or imprisoned not more than five years, or both.

STATEMENT

On or about March 1, 1951, a federal grand jury in St. Louis, Missouri, commenced an investigation into the conduct of James P. Finnegan in his capacity as Collector of Internal Revenue in that city. The jury was interested in learning whether petitioner, Finnegan, and others had attempted to obtain a tax refund for the May Department Stores which, with interest, would have amounted to approximately ten million dollars; whether this same group had attempted to acquire control of the Nicaro Nickel plant owned by the United States Government in Cuba; and whether there was any connection between these two matters (Tr. 29-31, 18-23, 33, 40-41). The investigation was prompted by an article appearing in the *St. Louis Post-Dispatch* (Tr. 25, 80-81, 93-94). Special agents of the Bureau

of Internal Revenue also investigated these matters during 1951 and reported to the grand jury (Tr. 79-84, 93-96).

The six-count indictment returned against petitioner in the United States District Court for the Eastern District of Missouri relates to his conduct and testimony in the course of these investigations. Petitioner testified regarding the Nicaro Nickel and May Department Store matters before the special agents of the Bureau of Internal Revenue on November 7, 1951 (Tr. 115; Gov. Ex. 17), and before the grand jury on November 27, 1951, and February 7, 1952 (Tr. 172; Gov. Ex. 18; Tr. 201, 628; Gov. Ex. 48). The first count of the indictment charged him with unlawfully endeavoring to influence a witness before the grand jury and to obstruct the administration of justice in violation of 18 U.S.C. 1503 (R. 1-4). The other five counts charged perjury in violation of 18 U.S.C. 1621—counts II and III relating to perjurious statements by petitioner before United States Treasury agents (R. 4-9), and counts IV, V, and VI to perjurious statements before the grand jury (R. 9-15). The jury found petitioner guilty on all six counts (Tr. 1280), and he was sentenced to three years' imprisonment on each of the six counts, the sentences to run concurrently, with a $2,000 fine also imposed under count II (R. 29). On appeal (R. 65-66) the judgment was unanimously affirmed (R. 90).

In relation to the first count, charging obstruction of justice, it was shown that Anderson, a min-

ing engineer, who was interested in the purchase of the Nicaro plant (Tr. 265) and who had been told that Finnegan and others expected a million dollars on settlement of the May Company's claim (Tr. 273-274), wrote petitioner a letter on February 18, 1950 (Gov. Exs. 19 and 32; Tr. 278, 281) reading as follows:

> I have been thinking that, if this Nicaro deal can't be completed, we ought to propose to Finnegan and Boyle that they put the million dollars that they expect to get from the May Company into something else.
>
> * * * * *
>
> In other words: Don't let this million bucks get away from us. * * *

On November 1, 1951, Anderson received a note reading as follows (Gov. Ex. 33; Tr. 282-283):

> Dear Andy: Please destroy any copies of this letter or any other that refers to Finnegan. Please.

Enclosed with the note was the original letter of February 18, quoted above (Tr. 282-284). Anderson received them in an envelope addressed to him at Muskogee, Oklahoma, bearing petitioner's return address and postmarked at St. Louis, Missouri, October 29, 1951. It was admitted by petitioner's counsel that the note, address on the envelope, and return address were in petitioner's handwriting (Tr. 492, 493). On October 29, 1951, Anderson at

Muskogee, Oklahoma, had received a telephone call from petitioner at a pay station in St. Louis in which petitioner stated, "I am returning a letter to you today which I wish that you would destroy. And also destroy any other copies that you have in your files. This Finnegan matter is getting hot, and if anyone questions you about it tell them that your only connection with it is metallurgical advisor." (Tr. 284, 285, 497.) The foregoing evidence was also the basis of count V (R. 11-13) in which petitioner was charged with giving false testimony before the grand jury on February 7, 1952, to the effect that he had never received the letter of February 18, 1950, had not returned it to Anderson to be destroyed, and had not talked with Anderson by long-distance telephone in regard to destroying this letter.

As to the perjury counts, the court below, in affirming the conviction, reviewed the evidence only on count II, on which a fine was imposed in addition to sentence.[2] Under count II (R. 4-7), as it was finally submitted to the jury after part of the specifications were withdrawn by the court (Tr. 1235-1236), the indictment charged that petitioner

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[2] As to the other counts, count III charged that petitioner falsely stated under oath to a revenue agent that he had never discussed with Finnegan the matter of raising money for the purchase of Nicaro Nickel, count IV that petitioner falsely swore before the grand jury that he never discussed the May Department Store claim with Finnegan and Anderson, and count VI that petitioner falsely swore before the grand jury that he never mentioned the May Company claim to Finnegan or anyone else (R. 4-15).

on November 7, 1951, while under oath, stated to certain agents of the Bureau of Internal Revenue (who were investigating the tax liabilities of the May Department Stores Company for the fiscal years 1942 to 1947, inclusive, the liabilities of petitioner for the calendar years 1949 to 1950, inclusive, and those of James P. Finnegan for the same years) that (1) he did not know Fred Salomon of the May Department Stores; (2) he had never talked with said Salomon; and (3) he had never seen any executive in the May Department Stores Company. Petitioner so testified before a Bureau of Internal Revenue agent (Tr. 115; Gov. Ex. 17, questions and answers 85 to 92).

The government's evidence showed that Huber, an accountant, who was handling a tax claim for Bolz, a friend of petitioner, met with petitioner and Bolz. Either Bolz or petitioner asked if "anything could be done to expedite" the May Department Stores' claim for an income tax refund which Huber's firm had prepared. (Tr. 572-575.) About a week later, at another meeting of the three men, petitioner stated that perhaps something could be done to "expedite" the May claim. (Tr. 576-578.)

At about this same time, petitioner told Bode, the store manager of Famous-Barr (the May Company store in St. Louis), at the latter's office on the eleventh floor of the store, that petitioner and "presumably the gentleman with him (Bolz) were in a position to be helpful to the May Department Stores Company in some tax matters" (Tr. 661). Bode

suggested that they see Fred Salomon, the vice-president of May Department Stores Company. Bode walked to the door and said, "You'll find Mr. Salomon's office right down the hallway about midway, and you can inquire down there." (Tr. 662, 664.)

Gertrude O'Donnell, Fred Salomon's secretary, testified that she personally ushered petitioner into Salomon's office on this occasion, and that petitioner and the gentleman with him remained in the office for about five minutes. (Tr. 657-660).

Bolz testified that when he and petitioner went to the eleventh floor of the Famous-Barr store, petitioner asked Salomon's secretary if they could talk to him (Tr. 1171). After being introduced, petitioner "told Mr. Salomon that he understood they [the May Company] had quite a sizable claim and that [Bolz] had a sizable claim and would like to know the attorneys that they were using in Washington to further that claim." Salomon was unable to contact by telephone the party whom he wanted to give this information, and petitioner and Bolz left their telephone numbers with Salomon so that he could contact them later regarding it. (Tr. 1172-1173.)

Petitioner admitted the meeting with Salomon where he and Bolz asked for the name of the law firm employed by the May Company so that the firm might be available for Bolz's claim (Tr. 835-836). Petitioner denied, however, that he told Bode that he was in a position to help May Stores

in some tax matter, and denied that before seeing Salomon he met Bode, who then referred him to Salomon's office (Tr. 839-840).

Petitioner further testified that, after his interview on November 7, 1951, with the government agent, he learned for the first time from a telephone conversation with Bolz that, when they went to the Famous-Barr offices, they had seen Fred Salomon instead of a Sidney Salomon, as petitioner thought, and that the May Company was a holding company for Famous-Barr. According to the petitioner, when he telephoned the agent about this misunderstanding the agent told him to come to his office in the morning. Then on the next day petitioner told the agent that the only May Department Store he knew of was in Cleveland, and that he had in fact talked to Fred Salomon. (Tr. 956-958.) Petitioner's testimony regarding this November 8th meeting was at variance with that of the agent who stated that petitioner, while admitting that he went to May Department Store or Famous-Barr, did not mention the confusion between Sidney and Fred Salomon (Tr. 142-143, 151). In its final charge the court permitted the jury to take into consideration any statements petitioner made to the government agents on November 8th tending to establish a misunderstanding on petitioner's part in connection with his testimony before the agents on November 7, 1951 (Tr. 1262).

ARGUMENT

1. Petitioner attacks the conduct of the trial judge (Pet. 21-26), asserting that he conducted

a too lengthy cross-examination of petitioner, phrased his questions in a partisan manner, and improperly assumed the role of prosecutor. However, in a lengthy trial petitioner points to relatively few instances of alleged improprieties by the trial court. Some passages cited relate to instances where the petitioner, an evasive witness, was giving unconvincing testimony often in conflict with that of government witnesses, and the court was affording him an opportunity to explain it (*e.g.*, Tr. 740, 793-795); others disclose an honest attempt by the court to clarify factual issues (*e.g.*, Tr. 762, 863-869). And in complaining (Pet. 10) of the part of the court's charge reading, "Do you think, members of the jury, that these things could have taken place * * *" (Tr. 1261), petitioner omits the rest of the sentence which impartially gave the jury a choice between petitioner's version of disputed facts and that of government witnesses.[3]

In its charge the court made it abundantly clear that the jury were the exclusive judges of the facts, the credibility of the witnesses, and the weight to be given to their testimony (Tr. 1211-1212, 1213,

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[3] The full quotation is as follows (Tr. 1261-1262):

"Do you think, members of the jury, that these things could have taken place, that is, the conversation with Huber, the accountant, whether you take the defendant's version of that conversation or Huber's version, or that conversation in the May Department Stores, whether you take the defendant's version or that of the Manager of the Famous-Barr?

"And take this testimony of the defendant before the Agent McWilliams that I have just referred to; could the defendant have been in error and confused as to which Salomon was being referred to? That is the question that you are called upon to determine."

1215, 1230, 1231, 1252, 1260, 1262, 1263). The court expressly charged, "I don't represent either side in this case" (Tr. 1272). And in addition to cross-examining petitioner, the court followed the same procedure with government witnesses (*e.g.*, Tr. 17-19, 29, 92).

The trial judge sought to ferret out the truth by examining both government and defense witnesses, in order to obtain a completely accurate picture of all the facts, both for his own benefit and that of the jury. Although a number of questions was asked, the fact that the true situation as elicited by the inquiries turned out to be adverse to the defense rather than the prosecution did not spell improper, partial advocacy on the part of the judge, who acted well within the bounds of permissible discretion in conducting the trial. Cf. *Giallo* v. *United States*, 206 F. 2d 207 (C.A. 2), affirmed *per curiam*, 346 U.S. 929; *Glasser* v. *United States*, 315 U.S. 60, 82; *United States* v. *Aaron*, 190 F. 2d 144, 146 (C.A. 2), certiorari denied *sub nom. Freidus* v. *United States*, 342 U.S. 827; *United States* v. *Breen*, 96 F. 2d 782, 784 (C.A. 2), certiorari denied, 304 U.S. 585; *Simon* v. *United States*, 123 F. 2d 80, 83 (C.A. 4), certiorari denied, 314 U.S. 694.

2. There is no merit to petitioner's contention (Pet. 26-32) that the court below erred in reviewing principally the sufficiency of the evidence for conviction under count II (see Pet. App. 48-49), instead of reviewing all six of the counts.

Petitioner has made no showing, other than his

bare assertion, that evidence under the other counts induced the verdict of guilty under count II. While it is true that the court below in its opinion referred to some evidence (Pet. App. 50-52) involved in other counts (*e.g.*, the letter of February 18, 1950, pertinent in counts I and V), the purpose of such references was to give the reader a picture of the general circumstances surrounding the entire case; and there was no intimation or holding that evidence under the other counts induced the conviction under count II, the factual elements of which were separable from the other counts.[4]

The evidence disclosing petitioner's guilt under count II was clear (see Statement, *supra*, pp. 7-10), and he is unable to challenge its sufficiency to support his conviction. Since the conviction was properly sustained under count II, and the concurrent sentences of three years' imprisonment on all the counts were less than the maximum sentence which might have been imposed under any one count, the court was not required to review the sufficiency of the other counts. *Pinkerton* v. *United States*, 328 U.S. 640, 641-642, fn. 1; *Hirabayashi* v. *United States*, 320 U.S. 81, 85; *Claassen* v. *United States*, 142 U.S. 140, 146-147.[5]

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[4] In *United States* v. *Rose*, 215 F. 2d 617, 630 (C.A. 3) (Pet. 30), the court reviewed all five counts of the indictment upon which a conviction had been obtained, directed an acquittal as to the first four, and a new trial as to the fifth—a situation obviously different from that here, where the conviction under count II was clearly supported.

[5] There is no merit to petitioner's contention (Pet. 32-33) that the conviction under count II cannot be sustained,

Moreover, petitioner does not show that the evidence was insufficient on any count. Certainly the evidence as to counts I and V (see Statement, *supra*) was conclusive.

3. Petitioner contends that the trial court erred in requiring the defense to make available to the government an unsigned and unsworn transcript of Anderson's statements taken before a court reporter in question and answer form in the office of petitioner's counsel on May 1, 1952 (Tr. 346-347, 463, 465-468), which petitioner's counsel was using to cross-examine Anderson at the trial. It is said that this was an unlawful interference with the work product of counsel, which denied petitioner effective assistance of counsel. (Pet. 34-38.) The colloquies showing the setting regarding this question are set out in the footnote below. [6]

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since there was no required finding that the petitioner, at the time of his alleged perjurious statement regarding Bode as the other executive (in addition to Salomon), had knowledge that it was false. In the court's charge, it was explicitly stated that "even though the [petitioner] you may find testified falsely * * * before the Agent, that is not sufficient to convict him * * * but it must appear * * * that he knew the testimony he was giving was false" (Tr. 1249); and that the "charge is, in each count of the indictment, two to six, that while under oath [petitioner] knowingly * * * testified falsely * * * " (Tr. 1253). The testimony about seeing Bode, moreover, was but one of the specifications of perjury under count II, so even assuming *arguendo* that this was insufficient, the evidence under the other specifications about not knowing and talking with Salomon was sufficient for conviction. Cf. Tr. 1249-1250; *United States* v. *Otto*, 54 F. 2d 277, 279-280 (C.A. 2); *Shallas* v. *United States*, 37 F. 2d 692, 694 (C.A. 9).

[6] "Mr. Purl [government counsel]: Could I have a copy of the transcript from which you are questioning the witness?

Apart from the sufficient point that he suggests no concrete way in which he may have been prejudiced by the fact that government counsel was

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"Mr. Bartlett: We're not obligated to give him a copy of this, your Honor.

"The Court: Well, as a matter of courtesy; you don't want him up looking over your shoulder?

"Mr. Bartlett: If your Honor wants us to give him one, as a matter of courtesy, we shall obey your Honor's instructions.

* * * * *

"The Court: If you've got a copy, let counsel have it.

"Mr. Morris: I've got mine all marked up with notations on the side.

* * * * *

"The Court: * * * If you don't want to let [government counsel] have a copy, just say so and I will tell him he cannot have a copy. They have no right to force you to give them a copy." (Tr. 353, 354.)

* * * * *

"The Court: Mr. Bartlett, I'm of the impression you are going to read only parts of the statement?

"Mr. Bartlett: Yes, sir.

"The Court: Then the government is entitled to read other parts of it. The government is entitled to examine that. For illustration, if there are other parts which explain some answers, I think the government is entitled to those.

"Mr. Bartlett: Could I solve the whole problem by reading the whole thing to the jury so we can get one connected story?

"The Court: No, you can't. You know why you can't. That is an improper comment for you to make. * * * Unless you are prepared to let the government examine that statement I can't let you continue to read it because I think they are entitled to see if there are any other statements in there that explain answers that you have read, the same as a deposition.

"Mr. Bartlett: Then your Honor makes it a condition of my interrogating the witness with respect to this statement that I show it first to the government?

* * * * *

"The Court: * * * You can continue with the examination, and in the recess this evening, unless you want to hold it until

permitted to see the statement from which the defense was reading, petitioner is mistaken in his interpretation of *Hickman* v. *Taylor*, 329 U.S. 495. That case recognizes that written material obtained by an adversary's counsel may under certain circumstances be subject to discovery if "useful for purposes of impeachment or corroboration", 329 U.S. at 511, but there the plaintiff had available the testimony of the witnesses at a public hearing before the United States Steamboat Inspectors (at p. 509), rendering the production of the statements taken by defendant's counsel unnecessary. Here the transcript was not available to the government and was not part of the private file or work product of petitioner's counsel since it was merely a question and answer statement produced publicly in open court and used in the manner of a deposition on cross-examination of a government witness for impeachment purposes. In such circumstances the district court ruled correctly, in consonance with fair procedure, in making the transcript available to the government for possible use

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tomorrow morning, but sometime before this witness is finally excused the government will have a right if they want to to examine the statements to see if they want to refer to anything in it. Proceed.

"Mr. Bartlett: May I go on with this interrogation?

"The Court: Yes, but I have laid down the condition on which you may.

"Mr. Bartlett: Yes, sir, they can have it under your Honor's orders." (Tr. 365-367.)

The transcript was later turned over to the government counsel and Anderson was permitted to read it before concluding his testimony (Tr. 441).

in referring to other parts of it to meet the force of impeaching statements adduced by petitioner. Cf. *Affronti* v. *United States,* 145 F. 2d 3, 7 (C.A. 8). When statements are similarly used by the government, the defendant is entitled to see them. Cf. *Gordon* v. *United States,* 344 U.S. 414.

Additionally, the court below properly held that petitioner was foreclosed from raising the alleged error since—apparently recognizing the absence of prejudice to which we have referred—he did not object to the trial court's order to turn over the transcript to government counsel for inspection (Pet. App. 57). Thus, petitioner's counsel stated that if the trial court wanted a copy of the transcript given to government counsel, he would "obey your Honor's instructions" (Tr. 353); he offered to read the entire transcript to the jury (Tr. 366); and he consented that the government could "have it under your Honor's orders" (Tr. 367). These remarks by petitioner's counsel disclose a clear acquiescence in the procedure followed, with no objections at the time, and brand his present contention a pure afterthought. The suggestion that the court below erroneously confused "objection" with "exception" (Pet. 37) is specious. Although an exception is not now required after an objection is made, this does not dispense with the necessity of an objection to a ruling in order to give the trial court an opportunity to rule correctly if it has been in error. Here no objection whatever was made to the trial court's ruling; the matter was not properly

cognizable on appeal. *Mitchell* v. *United States*, 208 F. 2d 854, 857 (C.A. 8); *United States* v. *Jones*, 204 F. 2d 745, 748 (C.A. 7), certiorari denied, 346 U.S. 854.

4. Equally unsubstantial is petitioner's contention that the trial court erred in admitting in evidence statements contained in newspaper articles and grand jury testimony (Pet. 38-41). The court admitted this evidence for very limited purposes satisfactory to petitioner's counsel, and the jury was not at liberty to consider the statements as substantive evidence of their truth.

The newspaper articles were limited to showing the purpose for which the investigation was being conducted and the subject matter of the articles, and not to show the truth of the statements made therein (Tr. 104-105, 140-141, 292-293).[7] And the court clearly instructed the jury that when the

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[7] *E.g.*, *Tr.* 104-105:

"Members of the jury, an article in the Post-Dispatch has been referred to, as you have heard a number of times, and the article is now going to be read to you. Now, you are not to assume, in hearing this article, that anything said in the article is true. That article prompted certain investigations, and that is the reason it is offered and received in evidence, that it served the purpose of causing investigations to be made, but as to the things that are said in the article, do not consider any of those statements as true.

"Mr. Bartlett: Something more than that. Not only that they just not consider them true, but they are not evidence at all of the facts as stated in the article.

"The Court: Well, I will go farther and say they are not only not to be considered by you as true, but as not evidence of the facts referred to in those articles. Is that satisfactory?

"Mr. Bartlett: Precisely."

United States Attorney in the grand jury proceeding mentioned in a question that a witness had made a certain statement, this was not to be considered by them as proof of what the witness had stated (Tr. 193, 194-195).[8] No objection was made as to other grand jury testimony read to the jury (Tr. 645, 1181, 1186-1187, 1188).

The court in its final charge further clearly limited the purpose of such evidence (Tr. 1267):

> In all criminal prosecutions, the defendant shall enjoy the right to be confronted with the witnesses against him and hence you will not consider any newspaper article that may have been admitted in evidence as any proof whatsoever of any fact or statement reported in the article, or as any proof such reported statements were given, and for the same reason no testimony or other statement of any witness

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[8] *E.g.*, Tr. 194-195: After the reading of the grand jury question that Salomon had told the United States Attorney that petitioner went with Bols to Salomon's May Company office, the following occurred:

"Mr. Bartlett: Wait a minute. I ask the Court to instruct the jury that that statement of the questioner is not a fact, not to be considered by them as a fact, that Mr. Salomon ever made such a statement or if he had made such a statement that it is proof of what Mr. Salomon stated, [and in] neither case to be considered evidence.

"The Court: Remember, Jury, I give you the same instruction as to the statement just made as to what Mr. Salomon is supposed to have said as I have given you in reference to the other statements that the questioner includes in his question, that you are simply to take it as what the question was, but you are not to assume when the questioner includes some statement of what somebody else said that there is any proof of that statement being true, what somebody else said or did."

> given at any time other than in this trial will be considered by you, unless there has been evidence offered of such statements in this trial and admitted in evidence.

And in refusing to allow the jury's request to have access to the newspaper clippings during its deliberations, the trial court explicitly informed the jury foreman (Tr. 1279): "The news clippings I cannot give to you, because they [were] offered for restrictive purposes, such as showing notice and knowledge, and they contain hearsay matters and matters about what other people may have thought or said, and I cannot give those to you." The repeated cautionary instructions by the trial court were designed to assure that the jury would not be misled into considering hearsay evidence for improper purposes.

5. Finally petitioner complains that the court improperly permitted the jury to find him guilty on the perjury counts on circumstantial evidence alone (Pet. 42-43). When read in its entirety, however, as it must be (cf. *Boyd* v. *United States*, 271 U.S. 104, 107), the charge is clearly not vulnerable to this criticism.

In the early part of the charge the judge made it clear to the jury that parts of the charge would apply to certain counts of the indictment with other parts applying to the whole case and that it would be improper for them "to disregard part of this charge that applies to the case and the various counts and use the remainder" (Tr. 1214). Later, after dis-

cussing count I, the court turned to a discussion of the perjury charges under counts II through VI. It gave a correct, unchallenged charge as to the necessary elements for a perjury conviction, *i.e.*, that the falsity of petitioner's statements under oath had to be shown by testimony of two independent witnesses, or by one witness and other corroborating facts and circumstances (Tr. 1251-1252). After giving a summary of the evidence under count II, the court charged: "Whether the charge in count two has been proven by the testimony of two witnesses or one witness, and strong corroborative testimony, is a matter for you to determine" (Tr. 1262). In regard to count VI the court instructed that if the jury believed the testimony of government witnesses Anderson, Bode and Huber they might "then consider whether or not the testimony of these witnesses corroborate one another" (Tr. 1266).

Later in the charge the court gave the customary instruction differentiating between direct and circumstantial evidence (Tr. 1268-1269), to which petitioner objected (Tr. 1275-1276) on the ground that the jury might erroneously believe perjury could be proved by wholly circumstantial evidence without regard to the "two witness" perjury rule. Part of the passage complained of reads, "The guilt of [petitioner] may be shown by circumstantial evidence or by both direct and circumstantial evidence" (Tr. 1269).

From the above summary it is submitted that when the charge is read in its entirety, it becomes

clear that the jury was instructed that in order to find petitioner guilty under the five perjury counts, it was necessary that they find falsity in his statements under oath by the testimony of two independent witnesses or by one witness and other corroborating facts and circumstances. To be sure, under the charge petitioner could have been found guilty under count I on circumstantial evidence, and such evidence could corroborate the direct testimony of a witness under the perjury counts, but this was entirely proper. From the complete charge, however, the jury could not have been misled into believing conviction possible on the perjury counts on circumstantial evidence alone. Cf. *Boehm* v. *United States,* 123 F. 2d 791, 809, 810 (C.A. 8), certiorari denied, 315 U.S. 800.[9]

[9] *Bollenbach* v. *United States,* 326 U.S. 607, and *Mills* v. *United States,* 164 U.S. 644 (Pet. 41), are quite different on their facts from the instant case and not apposite. *Bollenbach* involved a clearly erroneous last minute instruction after the jury had been hopelessly deadlocked for seven hours; and in *Mills* a glaringly inaccurate statement on the law of rape was included in an instruction under which the accused would have suffered the death penalty had not this Court reversed.

CONCLUSION

The case was tried in accordance with established legal principles, and the petition for a writ of certiorari presents no question calling for further review by this Court. It is respectfully submitted that the petition should be denied.

SIMON E. SOBELOFF,
Solicitor General,

WARREN OLNEY III,
Assistant Attorney General,

BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

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